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In The

Supreme Court of the United States

CAPITAL ONE BANK (USA), N.A., PETITIONER,

v.

RAQUEL RUBIO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Truth in Lending Act (TILA) provides that a credit card issuer must "clearly and conspicuously" disclose certain information in a credit card solicitation "in accordance with regulations of the [Federal Reserve] Board." 15 U.S.C. § 1632(a). The Board's Official Staff Commentary provides that a disclosure is "clear" when it is in a "reasonably understandable form." Contrary to the Board and the views of numerous other courts of appeals, a divided panel of the Ninth Circuit held that a disclosure cannot be "clear" if a reasonable person could read the disclosure in more than one way.

Here, a direct-mail solicitation sent by petitioner in 2004 described a credit card's Annual Percentage Rate (APR) as a "fixed rate of 6.99%" and on the same page stated that "terms (for example, rates and fees) are subject to change." App., *infra*, 66a. The panel majority held that petitioner had violated TILA by not making it "clear" that the consumer was not entitled to that interest rate for the rest of her life. In so holding, the Ninth Circuit committed the same error identified by this Court in *Chase Bank USA N.A. v. McCoy*, 562 U.S. ___ (Jan. 24, 2011), by effectively applying retroactively a 2009 Board regulation addressing a similar issue that the Board expressly made prospective only. The question presented is:

Whether, as a matter of law, a description of an interest rate as a "fixed" rate does not disclose the interest rate "clearly and conspicuously" for the purposes of the Truth in Lending Act unless the card holder receives that interest rate for the card holder's entire life.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Capital One Bank (USA), N.A. Capital One Financial Corporation is a wholly-owned subsidiary of Capital One Financial Corporation. Capital One Financial Corporation has no parent and no publicly traded company owns 10% or more of Capital One Financial Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Capital One Bank (USA), N.A. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1a-34a) is reported at 613 F.3d 1195. The opinion of the district court (App., *infra*, 35a-58a) is reported at 572 F. Supp. 2d 1157.

JURISDICTION

The Ninth Circuit issued its opinion on July 30, 2010. A petition for rehearing and rehearing en banc was denied on September 29, 2010. App., *infra*, 59a.

On December 22, 2010, Justice Kennedy granted a 30-day extension, until January 27, 2011, within which to file a petition for a writ of certiorari.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the appendix to this petition. App., *infra*, 60a-65a.

INTRODUCTION

A divided panel of the Ninth Circuit in this Truth in Lending Act (TILA) case committed the same error identified by this Court in *Chase Bank USA N.A. v. McCoy*, 562 U.S. ___ (Jan. 24, 2011) (rev'g 559 F.3d 963 (9th Cir. 2009)). As in *McCoy*, the Ninth Circuit mistakenly relied on a 2009 TILA regulation, promulgated five years after the disclosure at issue, in determining what the pre-2009 version of TILA regulations required of a credit card issuer. In so doing, the Ninth Circuit effectively made retroactive a new Federal Reserve Board regulation regarding the use of "fixed" to describe a credit card's interest rate.

The Ninth Circuit did so, even though nothing suggests that the Board believed that lenders' previous use of "fixed" to describe an interest rate that is not a "variable rate" (that is, one that does not vary from time to time based on changes in a published index of market interest rates) was not "in a reasonably understandable form" and therefore in compliance with TILA. To the contrary, the Board expressly recognized that the new regulation constituted a "major change," and provided that the new regulation would not take effect until February 22, 2010. Indeed, the Board expressly determined that a solicitation that looked just like the 2004 one at issue here was not required to comply with the new rule if mailed on or before the regulation's effective date, even if it was received by the consumer after that date.

If not reversed, the Ninth Circuit's ruling will subject petitioner and other creditors to the risk of substantial actual damages, statutory damages, and attorneys' fees. *See* 15 U.S.C. § 1640(a). That is because, as in *McCoy*, the Ninth Circuit's holding imposes TILA liability for a previously common and accepted industry practice. Before 2009, credit card issuers often described an Annual Percentage Rate (APR) as a "fixed rate" when the interest rate was not a "variable rate." In this case, a divided panel held that petitioner had nonetheless violated TILA because, as a matter of law, "it is not 'clear and conspicuous' to describe an APR as 'fixed' when the creditor has reserved the right to change the APR for any reason." App., *infra*, 12a.

The Ninth Circuit's holding deepens a broad circuit conflict regarding the proper method for determining whether a particular disclosure is made "clearly and conspicuously" within the meaning of TILA. 15 U.S.C. § 1632(a).

Review is warranted to resolve the conflict and prevent liability on credit card issuers for engaging in conduct that was permissible at the time it was undertaken, but only much later proscribed as the outgrowth of further agency study and action.

STATEMENT

A. Statutory And Regulatory Framework

The Truth in Lending Act was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the

various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). In furtherance of this purpose, TILA extensively regulates the disclosure of terms and conditions of credit in credit card solicitations, advertisements, and billing statements. The substance of the credit offers and agreements, however, are governed not by TILA, but primarily by state lending and contract law, and by some separate federal laws (such as the National Banking Act and the Equal Credit Opportunity Act) that are not at issue in this case.

1. The relationship between credit card issuer and credit card holder is predominantly contractual in nature. Credit card agreements generally lack any pre-determined duration. They are thus terminable at will by either party. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d (1979); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 798 (Va. 1985).[1] Indeed, the Customer Agreement between petitioner and respondent so provides: "We may at any time, with or without cause, with or without advance notice, and regardless of the existence or non-existence of a default under this Agreement, cancel this account and/or temporarily or permanently suspend your credit privileges under this Agreement." C.A.E.R. 67.

Consistent with contract law, there are three distinct means by which credit card issuers may

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[1] The contract in this case provides that it is governed by Virginia and federal law. C.A.E.R. 67

change the interest rate that they charge the credit card holder. The first is by including terms in the original agreement that provide that different interest rates may be applied in the future in specified circumstances (e.g., that higher interest rates will apply in the event of a card holder default). If the card holder defaults, then the issuer may increase the interest rate pursuant to the terms of the existing contract. *See McCoy*, 562 U.S. at ___, slip op. 10. Such a provision appears in the Agreement between petitioner and respondent, C.A.E.R. 67, but was not the basis for the change in interest rate experienced by respondent.

A second method for the credit card issuer to change the interest rate is for the issuer to amend unilaterally the existing terms of its contract with the card holder to apply a new rate. Virtually all credit card agreements include a provision (commonly referred to as a change-in-terms or reservation-of-rights provision) allowing the card issuer to amend the interest rate and other terms of the arrangement as a condition of continuing to extend credit. *See McCoy*, 562 U.S. at ___, slip op. 11. Petitioner's Customer Agreement with respondent, for example, provides that petitioner may "amend or change any part or provision of this Agreement, including the annual periodic rate(s) and any charges * * * at any time." C.A.E.R. 67. Where this second method is used, it is undisputed that TILA requires that the card issuer provide advance notice of the effective date of the change. *See McCoy*, 562 U.S. at ___,

slip op. 11-12 (citing 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1); 15 U.S.C. § 1637(i) (2010).[2] But no further assent of the customer is required for the change because the card holder already has agreed that petitioner can unilaterally amend the Agreement. Once the card issuer makes the change, even if the card holder does not incur any additional charges, the card holder must pay the existing balance at the new rate until the account balance is paid in full. *See also* Va. Code § 6.2-433(B) (authorizing lenders to amend interest rates in credit card contract simply by giving notice and to apply new rates "to all then outstanding unpaid indebtedness in the borrower's account under the contract or plan, including any such indebtedness that arose prior to the effective date of the amendment"). This also was not the method by which petitioner proposed that respondent's rate be changed.

A third method for the credit card issuer to change the rate is when the issuer offers the card holder a higher rate in exchange for access to additional credit. That is what occurred in this case. The card issuer offers to forgo its contractual right to terminate the account in exchange for the customer agreeing to accept a different rate. This method of changing the rate requires the card holder's acceptance, which is manifested by the card holder

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[2] The application of this notice obligation to default interest rates (as opposed to change-in-term interest rates) was the issue before this Court in *McCoy*, 562 U.S at ___, slip op. 19.

continuing to use the card for new purchases. If the card holder declines to accept the offer, then the card issuer terminates the account and the card holder continues to pay off the account at the old interest rate until the balance is paid in full. Thus, in this case, respondent was informed that she could continue to use the credit card after a particular date, in which case the higher APR proposed by petitioner would take effect, or she could make no further charges to her account and keep her existing APR and pay under the current terms. App., *infra*, 25a, 37a.

2. Against this background of state contract law, TILA acts to require various disclosures both before the consumer enters into a contractual agreement and then during the course of the relationship. *See* 15 U.S.C. § 1637 (describing required disclosures in open-end consumer credit plans, which includes credit cards). For credit card solicitations, the communication at issue in this case, a credit card issuer is required to disclose, in a tabular format, the "annual percentage rate applicable to extensions of credit under such credit plan" and various fees. 15 U.S.C. §§ 1637(a)(1), 1632(c).

TILA confers broad authority on the Board of Governors of the Federal Reserve System (Board) to issue regulations to carry out the Act. *See* 15 U.S.C. § 1604(a); *see also id.* § 1637(c)(6). Card issuers that act in good faith reliance on a rule, regulation, or interpretation by the Board or its staff are protected from civil liability under TILA. *Id.* § 1640(f). Those who fail to comply with any requirement of TILA may

be liable for actual damages, statutory damages, and attorneys' fees. *Id.* § 1640(a).

With regard to the manner of the disclosure, TILA requires that information required to be disclosed "shall be disclosed clearly and conspicuously, in accordance with regulations of the Board." 15 U.S.C. § 1632(a). The Board "may permit the use of terminology different from that employed in this subchapter if it conveys substantially the same meaning." *Ibid.* In addition, a creditor may "supply additional information or explanation with any disclosures," and those disclosures do not need to be made in a clear and conspicuous manner. *Id.* § 1632(b).

The Board promulgated Regulation Z, 12 C.F.R. Pt. 226, and Official Staff Commentary through notice-and-comment rulemaking. Section 226.5(a), entitled "Form of disclosures," simply repeats the statutory requirement that required disclosures be made "clearly and conspicuously." 12 C.F.R. § 226.5(a)(1). The Official Staff Commentary provides further guidance. It explains that "*clear and conspicuous* means in a reasonably understandable form and readily noticeable to the consumer." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 5a(a)(2).1.

3. In 2010, Section 226.5(a) of Regulation Z was amended by the Board to add a new provision regarding the use of the word "fixed" in describing APR.

Initially, in 2007, the Board proposed amending Section 226.5(a) on its own initiative, as part of a general revision of Regulation Z. *See McCoy*, 562

U.S. at ___, slip op. 3-4; Final Rule, 74 Fed. Reg. 5244, 5245-5246 (Jan. 29, 2009) (describing history of rulemaking). Thus, in January 2009, the Board issued a final rule that would not have changed the language of Section 226.5(a)(1) in any material respect. But it would have added Section 226.5(a)(2), entitled "Terminology." That new subsection would have provided that, if "an annual percentage rate is required to be presented in a tabular format * * *, the term fixed, or a similar term, may not be used to describe such rate unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open." *Id.* at 5401. The new regulation would have had an effective date of July 1, 2010. *McCoy*, 562 U.S. at ___, slip op. 4; 74 Fed. Reg. at 5389.

On May 22, 2009, however, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009). Section 103 of the Credit CARD Act added a new provision to TILA addressing the use of the term "fixed" to describe the APR. That provision states that, "[w]ith respect to the terms of any credit card account under an open end consumer credit plan, the term 'fixed', when appearing in conjunction with a reference to the annual percentage rate or interest rate applicable with respect to such account, may only be used to refer to an annual percentage rate or interest rate that will not change or vary for any reason over the period specifie[d] clearly and conspicuously

in the terms of the account." *Id.* tit. I, § 103, 123 Stat. at 1741 (codified at 15 U.S.C. § 1637(m)). The Credit CARD Act also provided that this provision would take effect on February 22, 2010 (nine months after enactment). *Id.* § 3, 123 Stat. at 1735.

In response to the Act, the Board determined that its January 2009 final rule was "consistent" with the Act's requirement, although the Board noted that its regulation was broader than the Act. 74 Fed. Reg. 54,124, 54,130 (proposed Oct. 21, 2009); Final Rule, 75 Fed. Reg. 7658, 7665 (Feb. 22, 2010). The Board thus adopted its earlier regulation to effectuate the Act and its purposes. 75 Fed. Reg. at 7796 (codified at 12 C.F.R. § 226.5(a)(2)). Consistent with the Act, the Board provided that the effective date of the regulation would be February 22, 2010. *Id.* at 7780. The Board declared that the regulation "is prospective in application." *Ibid.* Indeed, the Board gave an example for credit card solicitations that stated that if the "solicitation is mailed to a consumer" the day before the regulation's effective date, "it is not required to comply with the new requirements, even if the consumer does not receive it until" after the effective date. *Id.* at 7781.

B. Factual And Procedural Background

1. In 2004, respondent Rubio received a direct-mail credit card solicitation from petitioner.[3] That

[3] The appendix contains the best copy from the record of the solicitation App., *infra*, 66a-67a.

solicitation described the APR that could be charged as a "fixed rate of 6.99%." App., *infra*, 66a. On the same page, in the second bullet of the "Terms of Offer" below the table, the solicitation provided that if respondent received a credit card, she also would receive "the Capital One Customer Agreement" and she would be "bound by its terms and future revisions thereof. [The] Agreement terms (for example, rates and fees) are subject to change." App., *infra*, 66a. The solicitation further identified particular circumstances in which the APR could be increased by Capital One without amendments to the Agreement, *e.g.*, in cases of default. App., *infra*, 66a. Those circumstances were located outside the table, as required by the Board's instructions. *See* 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 5a(b)(1)-7.

The Customer Agreement was provided to respondent before she became obligated on the contract. As noted above, that Agreement afforded each party the right to terminate the Agreement at any time, in which case the then-applicable terms of the Agreement would remain in effect until any outstanding balance was paid off. C.A.E.R. 63-64.

For more than three years, respondent borrowed from petitioner at the 6.99% APR on all purchases. App., *infra*, 4a.

In August 2007, petitioner notified respondent that because of increases in interest rates generally,

petitioner was offering her a choice either to close her account and pay off the balance of her account over time at the fixed 6.99% APR described in the 2004 solicitation or to continue using her credit card to make new purchases, in which case her APR would be made a variable rate. App., *infra*, 25a. As of August 2007, the variable rate would have been 15.9%. App., *infra*, 25a. The complaint does not disclose which option respondent chose. App., *infra*, 4a.

2. Respondent filed an action against petitioner on behalf of herself and a putative class alleging, inter alia, that petitioner violated TILA and California law by failing to clearly and conspicuously disclose the APR.

The district court granted petitioner's motion to dismiss the TILA claim. App., *infra*, 35a-58a. The court held that the use of the term "fixed rate" was clear and conspicuous. The court held that in context, the term "fixed" was intended to communicate that the rate was not a "variable" rate, *i.e.*, "not tied to an underlying interest rate index." App., *infra*, 47a. The term was not intended to indicate "that the rate is permanent over time." App., *infra*, 53a. To the contrary, petitioner's "solicitation is devoid of *any* temporal claims about the fixed rate." App., *infra*, 45a. Instead, petitioner's "statement in the 'TERMS OF OFFER' informing [respondent] that the terms of the agreement, including rates, are subject to change"

"both comply with TILA and could not be misleading to a reasonable consumer." App., *infra*, 54a.[4]

3. As relevant to this petition, the Ninth Circuit reversed in a divided opinion. App., *infra*, 1a-34a. The panel majority held that TILA requires that the disclosure of APR in a credit card solicitation not be "misleading." App., *infra*, 8a. The panel concluded that a disclosure "that is not 'clear and conspicuous' is *ipso facto* 'misleading.'" App., *infra*, 8a. And a disclosure that "a reasonable consumer will either not understand or not readily notice" is not "clear and conspicuous." App., *infra*, 8a. Moreover, it reasoned that "any disclosure that a reasonable person could read to mean something that is not accurate" is not clear. App., *infra*, 13a.[5]

In determining whether the APR disclosure was "clear," the Ninth Circuit explained that "empirical evidence is helpful in determining what a reasonable consumer will understand." App., *infra*, 9a. The panel then looked itself to information on the

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[4] The district court also dismissed respondent's state law breach of contract claim and Unfair Competition Law claims. App., *infra*, 36a, 55a-58a. The court of appeals affirmed the dismissal of the contract claim but reversed the dismissal of the Unfair Competition Law claim because an alleged violation of TILA also would constitute a violation of state law. App., *infra*, 18a-21a. No further review of those holdings is sought, except to the extent that the state law claims rely on the determination that respondent stated a claim under TILA.

[5] Respondent did not argue that the disclosure was not conspicuous. App., *infra*, 26a n.2.

Internet that was not contained in the record or pointed to by either party. That information had been developed by a research firm retained by the Board to conduct consumer testing in anticipation of the promulgation of new rules. App., *infra*, 9a-10a. That research, the panel majority determined, concluded that "in the minds of a significant number of consumers, the term 'fixed' means 'unchangeable.'" App., *infra*, 14a. The panel noted that the Board responded to that research by proposing a new prospective regulation that provided the circumstances under which the term "fixed" could be used. App., *infra*, 10a-11a. The Ninth Circuit concluded that "[w]hat was misleading in 2006 and 2007, when the consumer studies were conducted, was also misleading in 2004, when [respondent] received [petitioner's] solicitation." App., *infra*, 12a.

The panel majority accepted that the term "fixed," when used in conjunction with an interest rate, "can also reasonably be interpreted to mean 'not tied to an index.'" App., *infra*, 13a. But the panel majority found that fact irrelevant: "it is precisely because reasonable consumers can interpret an ambiguous disclosure in more than one way that such a disclosure cannot be clear." App., *infra*, 13a.

The Ninth Circuit also concluded that the fact that the Official Staff Commentary used the terms "fixed" to mean "not tied to an index" did not show that a reasonable consumer would understand what the term meant. App., *infra*, 13a-14a.

Finally, the panel majority held that the language in the solicitation that "terms (for example, rates and fees) are subject to change" was not enough to make the meaning of the term "fixed" clear to a reasonable consumer. App., *infra*, 14a-16a.

The panel majority thus held that respondent had "successfully alleged a TILA violation" based on the solicitation she received. App., *infra*, 19a.

4. Judge Graber, concurring in part and dissenting in part, would have held that the clarity of the disclosure should be considered an issue of fact for the trier of fact. App., *infra*, 22a-34a.

In Judge Graber's view, petitioner had made "a clear and conspicuous disclosure of the potential for raising the APR" because "the solicitation advertised 'a fixed rate of 6.99%' but stated *on the same page* that the rates and fees were 'subject to change.'" App., *infra*, 23a. Judge Graber explained that the "disclosure was accurate in describing the rate as 'fixed'" because the term "fixed" "accurately describes an interest rate that is not linked to an external index and is not designed to expire or reset automatically at any particular point in time." App., *infra*, 26a-27a.

Nevertheless, Judge Graber would have remanded for a jury trial on whether "a reasonable consumer [would] understand that [petitioner] may alter the 'fixed' APR because market conditions change." App., *infra*, 27a. In her view, a fact finder could permissibly find that a reasonable consumer would

"understand that a 'fixed' rate on a credit card does not mean that the rate is 'permanent' or 'forever' when the issuer expressly and simultaneously reserves its right to 'change' its 'rates' later." App., *infra*, 28a.

Judge Graber disagreed with the panel majority that a TILA plaintiff should prevail whenever the lender's view is not the "only reasonable understanding." App., *infra*, 29a. Instead, she believed that the clarity of the disclosure was a question of fact that should not be resolved on a motion to dismiss. App., *infra*, 30a-31a, 34a.

Judge Graber also criticized the panel majority's reliance on "results of research done two years after [petitioner] sent the solicitation at issue here." App., *infra*, 31a. The research involved only 25 people who were not representative of the card-holding public. App., *infra*, 32a-33a. The dissent noted that "even the researchers seem to have been surprised by their results regarding the term" fixed. App., *infra*, 33a. Furthermore, the panel "bypassed the adversarial process" by relying on research not mentioned by either party "in briefing or at oral argument." App., *infra*, 33a. Thus, Judge Graber concluded, the panel was "entirely ignorant of whether there are other flaws in the study" or "if other research has yielded countervailing results." App., *infra*, 33a.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S READING OF TILA DEEPENS A CONFLICT IN THE LOWER COURTS AND WILL IMPOSE UNEXPECTED RETROACTIVE LIABILITY

A. The Ninth Circuit's Interpretation Of TILA Deepens A Conflict In The Circuits Regarding How To Determine Whether A Term Is "Clearly And Conspicuously" Disclosed

The majority of a Ninth Circuit panel held in this case that "any disclosure that a reasonable person could read to mean something that is not accurate" cannot be clear and conspicuous under TILA. App., *infra*, 13a. Indeed, the panel majority held that "a disclosure cannot be clear" when "reasonable consumers can interpret an ambiguous disclosure in more than one way." App., *infra*, 13a. That extreme reading of TILA's disclosure requirement is unsupported by the text and contrary to the Board's interpretation. Moreover, it is at one end of a three-way conflict regarding the meaning of the clear and conspicuous disclosure requirement.

1. In stark contrast to the decision below, the Seventh Circuit has held for more than 30 years that TILA's requirement of "clear and conspicuous" disclosure addresses only the *legibility* of the disclosure and not its understandability.

In *Smith v. No. 2 Galesburg Crown Finance Corp.*, the Seventh Circuit held that a disclosure was not "clearly" made under TILA because it was not

"legible." 615 F.2d 407, 418 & n.29 (7th Cir. 1980) (rev'd in other parts on other grounds, *Pridegon v. Gates Credit Union*, 683 F.2d 182, 193-194 (7th Cir. 1982)).

In *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), Judge Easterbrook expanded on this holding by rejecting a claim that "clear and conspicuous" was concerned with the substance of the words. "Clear and conspicuous manner * * * means *visible*, not *simple*. 'Manner' refers to the mode of presentation, not the degree of comprehension." *Id.* at 382. The Seventh Circuit explained that clear and conspicuous requirements are "staples of commercial law. The Uniform Commercial Code defines 'conspicuous' as 'so written that a reasonable person against who it is to operate ought to have noticed it.'" *Ibid.*; *see Jordan v. Toyota Motor Credit Corp.*, 236 F.3d 866, 867 (7th Cir.) (refusing to overrule *Channell*), cert. denied, 533 U.S. 902 (2001).

The Seventh Circuit thus has held that "clarity depends on what a particular borrower would observe" in the document. *Smith v. Check-N-Go of Illinois, Inc.*, 200 F.3d 511, 514 (7th Cir. 1999). In that case, the plaintiff had alleged that a lender had violated the clarity requirement by stapling one paper to obscure a relevant disclosure. The court held that "whether particular disclosures are 'clear' is an issue for fact, for the extent to which one piece of paper obscures another varies." *Ibid.* Likewise, in *Cole v. U.S. Capital, Inc.*, 389 F.3d 719 (7th Cir. 2004), which interpreted the term "clear and

conspicuous" in the Fair Credit Report Act, the Seventh Circuit relied on its prior cases interpreting TILA to hold that "clear" looked only to presentation and not content. *Id.* at 729. The court of appeals reaffirmed that "the term 'clear and conspicuous' is a staple of commercial law" and focused only on the ability of a consumer to see the words. In order for a disclosure to meet the clear and conspicuous requirement, the Seventh Circuit held, "there must be something about the way that the notice is presented in the document such that the consumer's attention will be drawn to it." *Id.* at 731.[6]

Accordingly, in the Seventh Circuit, because petitioner's disclosures were visible and legible, they would have been found to be clear and conspicuous.

2. In contrast to the Seventh Circuit, other courts of appeals have held that TILA's "clear and conspicuous" disclosure obligation imposes some comprehensibility requirement on the mandated disclosures. But even those courts do not hold, as the Ninth Circuit did here, that *any* ambiguity constitutes a violation of TILA. Rather, a majority of courts hold that, so long as a disclosure is "reasonably" or "sufficiently" clear, that suffices to meet the clear and

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[6] In *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803 (7th Cir 2001), the court of appeals treated "clear" as relating to understandability. But the court there did not address the earlier holdings, and its treatment of "clear" has not been followed by any other Seventh Circuit case

conspicuous requirement. That apparently is in accord with the views of the Board.

As the First Circuit has explained, "[m]ost courts have concluded that TILA's clear and conspicuous standard is less demanding than a requirement of perfect notice." *Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12, 16 (1st Cir. 2007). Congress intended "higher tolerance levels for what it viewed as honest mistakes in carrying out disclosure obligations." *Id.* at 17. Thus, in the First Circuit, mere ambiguity is not enough. The question is "whether the average consumer, looking at the Notice objectively, would find it confusing." *Palmer v. Champion Mortg.*, 465 F.3d 24, 28 (1st Cir. 2006).

The Eleventh Circuit also has rejected that a disclosure must have absolute clarity to be clear and conspicuous. The Eleventh Circuit held that a disclosure that was "reasonably clear when applied to the particular facts involved in this case" met the clear and conspicuous disclosure requirement because it "provides sufficient notice." *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 581 (11th Cir. 1996). In so doing, it "respectfully disagree[d]" with a Third Circuit decision, discussed below, that had concluded that the same disclosure was not clear and conspicuous. *Ibid.* (refusing to follow *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066 (3d Cir. 1992)). The court of appeals explained that, although the disclosure did "not apply perfectly to the [plaintiffs'] situation, TILA does not require perfect notice; rather it requires a clear and conspicuous notice." *Ibid.*

The Second Circuit likewise has held that even a disclosure that "requires the consumer to exercise some degree of care and study" to understand it suffices to meet TILA's clear and conspicuous requirement. *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 118 (2d Cir. 1983). In the Second Circuit, a disclosure will not meet the clear and conspicuous requirement when it is "beyond the understanding of the average consumer." *Lundquist v. Security Pacific Automotive Financial Servs. Corp.*, 993 F.2d 11, 15 (2d Cir.) (per curiam), cert. denied, 510 U.S. 959 (1993); *see also Burton v. Public Fin. Corp. of Akron*, 657 F.2d 842, 843 (6th Cir. 1981) (disclosure not clear when it "borders on the incomprehensible").

The Ninth Circuit's holding that any ambiguity suffices to make a disclosure not clear and conspicuous also is in tension with the Fifth and Tenth Circuits. Those courts have held that clarity can be achieved even if there are clearer ways of conveying the information. Specifically, the Fifth Circuit has held that "[t]he question is not whether something is capable of semantic improvement, but whether it contains a substantial and accurate disclosure." *Dixon v. D.H. Holmes Co.*, 566 F.2d 571, 573 (5th Cir. 1978) (per curiam). Likewise, the Tenth Circuit has held that "a disclosure does not fail to be 'clear and conspicuous' * * * simply because a superior or more detailed statement could have been provided: the question is whether the disclosure is *sufficiently* clear for purposes of the statute." *Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874, 880 (10th Cir.

1992). The fact that subsequent disclosures "are more clear * * * does not compel the conclusion that the [earlier] disclosures were not clear and conspicuous." *Id.* at 880 n.8. The question is what "the average subscriber will likely understand," not whether the disclosure was a "model" of clarity. *Id.* at 883. In the Tenth Circuit, disclosures will be found to be clear and conspicuous even when they "lie dangerously close to the lowest limits of acceptable disclosure." *Ibid.*

The standards from the First, Second, Fifth, Tenth and Eleventh Circuits, albeit each with different wording, appear to be consistent with the Federal Reserve Board's Official Staff Commentary. That Official Staff Commentary, promulgated after notice-and-comment rulemaking, *see* 46 Fed. Reg. 50,288, 50,302 (Official Staff Interpretation Oct. 9, 1981), is usually entitled to enormous deference because of the breadth of Congress's delegation to the Board and its staff. *See McCoy*, 562 U.S. at ___, slip op. 16; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-569 (1980). The Official Staff Commentary provides that a disclosure is "clear" when it is in a "reasonably understandable form." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 5a(a)(2).1. Contrary to the Ninth Circuit's holding in this case, these other circuits and the Board do not require that the disclosure be "unambiguous" or susceptible of only one reasonable interpretation. App., *infra*, 13a.

Under the standards used in these other circuits and by the Board, petitioner's disclosures were clear.

It was reasonably understandable that petitioner did not offer an unchanging rate for respondent's entire life. To the contrary, the same page containing the "fixed rate" language also provided notice that "the rates and fees" were "subject to change." App., *infra*, 66a. Thus, the only way to reasonably understand the term "fixed rate" is in its common usage, to contrast with a variable rate tied to an index. App., *infra*, 23a, 26a-27a (Graber, J., dissenting).

3. In this case, the Ninth Circuit appears to have joined the Third Circuit in holding that TILA requires a perfect disclosure in order for it to be clear and conspicuous.

In *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066 (3d Cir. 1992), the Third Circuit held that when a disclosure was susceptible of two "sensible" or "plausible" readings, the disclosure did not provide the plaintiff with the "clear notice" required by TILA. *Id.* at 1077. As noted above, the Eleventh Circuit expressly disagreed with *Porter* in its *Veale* decision. *See* 85 F.3d at 581.

Likewise in *Rossman v. Fleet Bank (R.I.) National Association*, 280 F.3d 384 (3d Cir. 2002), the court of appeals held that, because TILA "is intended to provide clear information to consumers, such ambiguities should be resolved in favor of the consumer" when one reading "is at least as natural as interpreting it" otherwise. *Id.* at 394.

That extreme reading has no support in the use of the term clear and conspicuous in the statute or

the Board's interpretation. Review is warranted to address an interpretation that requires perfect notice from lenders.

B. The Ninth Circuit's Decision Effectively Makes New Federal Reserve Board Regulations Retroactive, Despite Their Express Prospective Effect

Applying the extreme version of the clear and conspicuous disclosure requirement, the Ninth Circuit reached a result that contravenes an express determination by the Federal Reserve Board: namely, the Board's decision to apply prospectively a rule regulating the use of the term "fixed APR" in credit card solicitations and advertisements. This was the same error the Ninth Circuit made in *McCoy*, mistakenly relying on the Board's current regulation in determining "what the pre-2009 version of Regulation Z required." *McCoy*, 562 U.S. at ___, slip op. 14.

Under the amended regulation, effective February 2010, a lender cannot use the term "fixed APR" "unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the [account] is open." 12 C.F.R. § 226.5(a)(2)(iii).

1. In 2009, before Congress passed the Credit CARD Act, the Board amended the TILA regulations to create a *new* disclosure requirement regarding use of the term "fixed APR." The Board described the amendment as one of the "major changes" of its

extensive Regulation Z amendments. Final Rule, 74 Fed. Reg. 5244, 5244-5245 (Jan. 29, 2009). As the dissenting judge noted below, "[n]othing in the former regulations suggested that the [Board] deemed the term 'fixed' to be misleading." App., *infra*, 33a.

In promulgating this new rule, the Board deliberately elected to make it prospective in effect, just as it did for the revised regulations at issue in *McCoy*, 562 U.S. ___, slip op. 5. The Board did so even though it had the power to make the rule effective immediately. Under TILA, regulations requiring any disclosure that differs from the disclosures previously required are normally effective in the October that follows at least 6 months after promulgation. 15 U.S.C. § 1604(d). But the Board can shorten that period when it makes a finding that such action is "necessary to * * * prevent unfair or deceptive disclosure practices." *Ibid.* Here, the Board elected not to shorten the period. 74 Fed. Reg. at 5388.

To the contrary, before passage of the Credit CARD Act, the Board exercised its discretion to *lengthen* the period of time from the default effective date of October 2009 to July 1, 2010. The Board initially determined to give creditors 18 months after promulgation so that they could adjust their forms to accommodate the new requirement. *See* 74 Fed. Reg. at 5388 (citing 15 U.S.C. § 1604(d)).

Moreover, in other circumstances, when the Board has concluded that a new regulation clarifies, rather than changes, an existing regulation, it has

contended that the clarifying amendment applies to pre-promulgation conduct. *See, e.g.*, Final Rule, 63 Fed. Reg. 16,669, 16,673 (Apr. 6, 1998); *Clay v. Johnson*, 264 F.3d 744 (7th Cir. 2001). But the Board did not adopt that view of its new "fixed APR" regulation. Instead, it did just the opposite—stating this amendment was a "major change" that was "prospective in application." 74 Fed. Reg. at 5245, 5389.

Indeed, the Board illustrated the prospective effective date using the new "fixed APR" regulation. The Board explained that an "advertisement mailed on or after July 1, 2010 must comply with the final rule," including "rules regarding the use of the word 'fixed.'" *Id.* at 5389. By contrast, "an advertisement mailed on June 30, 2010 is not required to comply with the final rule even if that advertisement is received by the consumer on July 7, 2010." *Ibid.*

In other words, the Board expressly determined that an advertisement that looked precisely like the 2004 solicitation at issue here was *not* required to comply with the new rule governing "fixed APR" if mailed on or before June 30, 2010. While the Board subsequently shortened the effective date from July 1 to February 22, 2010, to accommodate the intervening passage of the Credit CARD Act, its analysis of the prospective effect of the rule did not change. *See* Final Rule, 75 Fed. Reg. 7658, 7780-7781 (Feb. 22, 2010).

The majority of the Ninth Circuit panel ignored the Board's clearly stated intent. Although respondent received the challenged disclosure in 2004—almost

six years before the new regulation's effective date—the majority nonetheless applied the Board's rationale for a prospective 2010 regulatory amendment to find a 2004 disclosure unclear. This was doubly erroneous because, as discussed below, the 2004 disclosure complied with the new regulation. *See* pages 32-33, *infra*.

2. The process by which the Board reached its conclusion to adopt its new regulation confirms that, before that new regulation, use of the term "fixed APR" was not understood to violate TILA's disclosure requirements.

In 2006, two years after petitioner sent out the solicitation at issue, the Board retained a research firm to conduct consumer testing and design improved credit card disclosures based on the results of the testing. *See* Macro Int'l Inc., *Design and Testing of Effective Truth in Lending Disclosures* 1 (2007), *available at* http://www.federalreserve.gov/dcca/regulationz/20070523/Execsummary.pdf. The firm prepared model credit card disclosures and conducted three rounds of interviews with a total of 25 individuals. In these early rounds of interviews, the research found that a number of participants "frequently assume[d] that a rate that is labeled 'fixed' cannot be changed." *Id.* at 33; App., *infra*, 31a-32a (Graber, J., dissenting). As the dissent explained, "even the researchers seem to have been surprised by their results regarding the term." App., *infra*, 33a.

The Board, addressing itself to this research, stated that although "creditors often use the term 'fixed' to describe an APR that is not tied to an index," study participants "did not appear to understand the term 'fixed' in this manner." 74 Fed. Reg. at 5373. It thus proposed a regulation governing the use of the word "fixed" to "ensure consumers *better* understand the credit terms offered." *Id.* at 5245 (emphasis added).

Contrary to the Ninth Circuit's holding (App., *infra*, 12a), that action is not the same as the Board finding that the term "fixed" was not clear, *i.e.*, that a reasonable consumer would not find this term reasonably understandable. At most, the Board determined that some consumers did not understand the term. But it is not the subjective understanding of a consumer (or even 25 consumers) that is material. In the Board's view, the proper inquiry is an objective one into whether the disclosure is in a "reasonably understandable form." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 5a(a)(2).1. The Board made no finding on that issue.

Indeed, the Board's action is consistent with its role as rulemaker. Congress vested the Board (unlike the courts) with broad authority to promulgate regulations that "in the judgment of the Board are necessary or proper to effectuate the purposes of" TILA and "to facilitate compliance therewith." 15 U.S.C. § 1604(a). The Board expressly invoked this broad authority in promulgating its 2010 rules.

See 74 Fed. Reg. 54,124, 54,130 (Oct. 21, 2009) (explaining that Board was extending rule beyond mere reiteration of Section 1637(m) of TILA to prevent circumvention and to benefit consumers).

The Ninth Circuit's rationale tracks an argument that was rejected by this Court in *McCoy*. The panel majority may well believe that "it is better policy to" limit the use of the word "fixed," because "both Congress and the Board have recently indicated that such a requirement is warranted" prospectively. 562 U.S. at ___, slip op. 14. But, as this Court held in *McCoy*, the fact that "Congress and the Board may currently hold such views does not mean" that the Board had the same "understanding of what the pre-2009 version of Regulation Z required." *Ibid.*

To the contrary, other contemporaneous action by the Board demonstrates that the Board continues to understand the term "fixed" in precisely the manner in which it was used in the solicitation at issue here. In August 2009, virtually at the same time the Board placed limits on the term "fixed" for credit cards, it required that very term to be used with regard to private education loans, even when the interest rate could change during the course of the loan. The Board requires a lender of private education loans to disclose "[w]hether the interest rates applicable to the loan are fixed or variable." 12 C.F.R. § 226.47(a)(1)(ii), (b)(1)(ii), (b)(4)(ii). The Official Staff Commentary explains that the term "fixed" should be used even if the interest rate could increase due to "delinquency (including late payment), default,

assumption, or acceleration." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 47(a)(1)(iii).

C. The Ninth Circuit's Decision Will Result In Broad Negative Consequences

1. The Ninth Circuit's decision will have serious negative effects, including potentially imposing retroactive liability on lenders for a practice that was widely engaged in before the Board's amendment to the regulation. If not reversed, that ruling subjects petitioner and other creditors to the risk of substantial actual damages, statutory damages, and attorneys' fees. *See* 15 U.S.C. § 1640(a).

The Board itself explained in 2007 that "[c]reditors *often* refer to an APR as 'fixed' to denote an APR that is not tied to an index." 72 Fed. Reg. 32,948, 33,025 (June 14, 2007) (emphasis added). That conclusion is supported by the secondary literature. "[C]redit card issuers often raised 'fixed' APRs in reliance on provisions in their credit card account disclosures allowing an increase in a 'fixed' APR through change-in-terms notices provided to cardholders." Styskal, Wiese & Melchione, LLP, *SW&M Emerging Issue: Federal Court of Appeal Finds that Credit Card 'Fixed' Annual Percentage Rates Disclosed in 2004 are Unchangeable,* (Sept. 28, 2010), http://www.law4cus.com/emergingissues.cgi?a=pr&n=20100928_171923.

More broadly, absent review by this Court, the Ninth Circuit's application of the 2010 Regulation Z amendments to prior conduct under the guise of the "clear and conspicuous" requirement will have an

enormous, adverse impact on lenders. As one commentator correctly concluded, the Ninth Circuit's decision "constitutes a retroactive application in effect, despite the court's express denial of doing so." Samantha R. Powers, *Ninth Circuit Making Retroactive Application of TILA Regulations?* The CFSL Bulletin (July 23, 2010), http://www.cfslbulletin.com/2010/07/articles/truth-in-lending-act/ninth-circuit-making-retroactive-application-of-tila-regulations. This is contrary to the thrust of *McCoy*, which held that, although the Board may develop "better policy" on a going-forward basis through rulemaking, that does not mean that its prior regulations had that import. 562 U.S. at ___, slip op. 14.

The panel majority's analysis and conclusion could expose lenders to liability for past conduct simply for failing to anticipate and to comply with the numerous new disclosure obligations created by the recent amendments—despite that the Board expressly determined that they should apply only prospectively. Those amendments resulted from "a comprehensive review of TILA's rules for open-end (revolving) credit," leading to extensive "changes to format, timing and content requirements." 74 Fed. Reg. at 5244.

This uncertainty and risk of substantial retroactive liability will harm lenders and consumers. Like all regulated entities, lenders need clear regulatory guidance and predictability to structure their products and pricing. If courts can impose *ex post facto* disclosure obligations on lenders based on the Board's

prospective regulations, lenders will face increased risk of liability, which will translate into increased costs for borrowers. This case thus "presents a cautionary tale of the danger of liability under TILA for prior disclosures despite the governing regulations at the time." Powers, *supra*.

2. This is especially so given the lack of merit to respondent's TILA claim. The panel majority held that when petitioner used the word "fixed" to describe an interest rate, a reasonable consumer could have understood that the rate would remain fixed for the consumer's entire life—even though on the same page the solicitation expressly stated that petitioner could change the rate.

Moreover, when petitioner proposed to change respondent's interest rate in August 2007, petitioner offered respondent a proposal that effectively complied with the future rule (whose final promulgation was still two years away). Even under that subsequently-promulgated rule, if no time period is provided for how long the rate will remain fixed, "the rate will not increase while the [account] is open." 12 C.F.R. § 226.5(a)(2)(iii). Here, petitioner received the "fixed" rate for more than three years after opening her account. At that time, petitioner simply could have exercised its contractual right to close the account, *see* p. 4, *supra*, thus fulfilling any obligation to provide the "fixed" rate while the account had remained open.

Instead, petitioner offered respondent a choice of either (1) closing her account to new charges and paying off her current balance at the current rate and at her own pace (subject to minimum payment requirements) or (2) accepting a new interest rate. App., *infra*, 25a, 37a. Providing the consumer such a choice should not create a TILA claim.

3. If the Ninth Circuit's decision is left standing, observers predict expansive litigation. "[M]any card issuers made changes to their 'fixed' APRs * * * through a change-in-terms notice * * * and, consequently, could be subject of litigation as the Bank was in the *Rubio* case." *SW&M Emerging Issue*, *supra*. If the Ninth Circuit's decision is permitted to stand, these card issuers could be the target of suits seeking hundreds of millions of dollars in damages, exerting enormous pressure on the issuers to settle legally unsound claims.

Lenders already are being subjected to similar TILA claims, some seeking class action status on behalf of a hundred thousand people. *See* First Am. Complaint ¶ 31, *Lopez v. American Express Bank, FSB*, No. 2:09-CV-07335 (C.D. Cal. Jan. 27, 2010), 2010 WL 3483465 (class estimated "to be in excess of 100,000 persons"). "Needless to say, the Court of Appeal[s'] decision could pose serious issues for those credit card issuers that made pre-February 22, 2010 changes to APRs previously disclosed as 'fixed.'" *SW&M Emerging Issue*, *supra*.

Indeed, press reports quote respondent's counsel as describing this as a "significant issue for a card industry defending other lawsuits like this." Jonathan Stempel, *Capital One Ordered to Defend Credit Card Lawsuit,* Reuters (July 21, 2010 3:24 PM), http://www.reuters.com/article/idUSN2116752120100721. Review of this significant issue is needed now.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 27, 2011

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Raquel Rubio, on behalf of herself and all others similarly situated, *Plaintiff-Appellant*, v. CAPITAL ONE Bank, *Defendant-Appellee.*	No. 08-56544 D.C. No. 2:07-cv-06766-ABC-CW OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, Chief District Judge, Presiding

Argued and Submitted
February 3, 2010 – Pasadena, California

Filed July 21, 2010

Before: Betty B. Fletcher, Harry Pregerson, and Susan P. Graber, Circuit Judges.

Opinion by Judge B. Fletcher;
Partial Concurrence and Partial Dissent
by Judge Graber

COUNSEL

Behram V. Parekh (argued) and Joshua A. Fields, Kirtland & Packard LLP, El Segundo, California, for the plaintiff-appellant.

James F. McCabe (argued), Nancy R. Thomas, and Michelle N. Comeau, Morrison & Foerster LLP, San Francisco, California, for the defendant-appellee.

OPINION

B. FLETCHER, Circuit Judge:

This appeal arises from a direct-mail credit card solicitation that Plaintiff Raquel Rubio received from Defendant Capital One Bank. The solicitation disclosed a "fixed" annual percentage rate of 6.99% on purchases and balance transfers and named three conditions under which that rate could increase. About three and a half years after Rubio applied for and received Capital One's credit card, the interest rate on purchases and balance transfers increased to 15.9%, even though none of the three triggering conditions occurred. Rubio filed suit, alleging violations of the Truth in Lending Act (TILA), the California Unfair Competition Law (UCL), and a breach of contract. The district court dismissed each of these claims under Federal Rule of Civil Procedure 12(b)(6), and Rubio appealed. We reverse in part, affirm in part, and remand.

I

Rubio's First Amended Complaint alleged that in or about February 2004, she received a credit card solicitation in the mail from Capital One, informing Rubio in an opening letter that she had "been

pre-selected . . . for a Capital One Platinum MasterCard featuring a low 6.99% fixed APR on balance transfers and purchases." In the solicitation's so-called "Schumer Box," a table required by federal law, the credit card's APR for purchases was described as a "fixed rate of **6.99%**," with the words in ten-point type and the number printed in large, bold type. Next to the Schumer Box's prominent heading, "**ANNUAL PERCENTAGE RATE** (APR) for purchases," was an asterisk linked to a paragraph printed just below the Schumer Box. That paragraph stated in ten-point type:

> All your Annual Percentage Rates (APRs) are subject to increase if any of the following conditions ("Conditions") occur: (i) you fail to make a payment to us when due; (ii) your account is overlimit; (iii) or your payment is returned for any reason. All APRs will change with the beginning of the billing period after the period in which the condition occurred. The first time any of the Conditions occur [sic], your purchase and special transfer APRs (if applicable) may be increased to a rate of 12.9% **ANNUAL PERCENTAGE RATE** (0.03534% daily periodic rate). If any of the Conditions occur [sic] twice within any 6-month period, all of your APRs may be increased to a rate of 25.9% **ANNUAL PERCENTAGE RATE** (0.07096% daily periodic rate).

Outside the Schumer Box, but farther down on the same page, there was a heading that read "Terms

of Offer." Under that heading, printed in eight-point type, the solicitation provided, as part of the terms: "I will receive the Capital One Customer Agreement and am bound by its terms and future revisions thereof. My Agreement terms (for example, rates and fees) are subject to change."

Rubio applied for the Capital One MasterCard, and received it, along with a Cardholder Agreement, in March 2004. In the Agreement, Capital One reserved the right to "amend or change any part of your Agreement, including periodic rates and other charges, or add or remove requirements . . . at any time."

According to the First Amended Complaint, the Capital One MasterCard provided Rubio with a 6.99% APR on all balance transfers and purchases from March 2004 to August 2007. Rubio never submitted a late payment, exceeded her credit limit, or had her payment returned. On August 3, 2007, however, Rubio received written notification from Capital One that her APR of 6.99% would increase to 15.9%. Rubio could avoid the increase only by closing her credit card account and paying off the balance on the card by September 11, 2007. Neither of Rubio's two Complaints alleges whether Rubio chose to retain or to close her account.

Rubio's First Amended Complaint included claims for breach of contract and violation of the UCL, and attached the Capital One MasterCard

solicitation as an exhibit. After briefing, the district court dismissed the breach of contract claim.

Rubio then filed a Second Amended Complaint that made very slight changes in factual allegations and added a TILA claim to the existing UCL claim. Like the First Amended Complaint, it attached Capital One's solicitation as an exhibit. Capital One moved to dismiss Rubio's TILA and UCL claims, and the district court granted the motion.

In reviewing de novo the district court's Rule 12(b)(6) dismissal, we, like the district court, consider the credit card solicitation, *see Parks Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995), as well as the Cardholder Agreement, which Capital One submitted but "whose contents are alleged in [the] complaint and whose authenticity no party questions," *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara,* 307 F.3d 1119 (9th Cir. 2002).

II

A

Direct-mail credit card solicitations are among the credit disclosures that TILA regulates. TILA requires that all such solicitations disclose, among other information, "[e]ach annual percentage rate applicable to extensions of credit under" the credit card agreement. 15 U.S.C. § 1637(c)(1)(A)(i)(I) (2006). This APR disclosure must be made "clearly and

conspicuously," *id.* § 1632(a), and "in the form of a table," *id.* § 1632(c)(2)(A). This table is popularly called the "Schumer Box."

TILA also delegates to the Federal Reserve Board of Governors the duty to implement TILA's disclosure requirements. *Id.* § 1604(a). Under that delegation, the Board has promulgated "Regulation Z," 12 C.F.R. pt. 226 (2009), to which provisions we defer unless "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565 (1980). To implement TILA's mandate that a Schumer Box disclose credit card APRs, Regulation Z requires a Schumer Box to disclose "[e]ach periodic rate that may be used to compute the finance charge on an outstanding balance . . . , expressed as an annual percentage rate." 12 C.F.R. § 226.5a(b)(1). Regulation Z provides that this APR disclosure, like other credit-card disclosures, must "reflect the terms of the legal obligation between" creditor and consumer. *Id.* § 226.5(c).

In applying TILA and its implementing regulations, we "require absolute compliance by creditors," *Hauk v. JP Morgan Chase Bank USA,* 552 F.3d 1114, 1118 (9th Cir. 2009), and "[e]ven technical or minor violations of the TILA impose liability on the creditor," *Jackson v. Grant,* 890 F.2d 118, 120 (9th Cir. 1989).

B

In her only unwaived TILA claim, Rubio contends that the Schumer Box in Capital One's solicitation

misleadingly disclosed the APRs that could be charged under the Cardholder Agreement. According to Rubio, by describing the APR as "fixed" at 6.99% and listing only three conditions under which the APR could be changed, the Schumer Box misled her into believing that 6.99% rate could increase only if one of the three specified events occurred. In doing so, Rubio argues, Capital One's disclosure did not accurately reflect the terms of the Cardholder Agreement, which reserved the right to change the 6.99% rate for any reason at all.

1

Capital One first argues that its disclosure was literally true, because the 6.99% rate could change under any of the three events in the paragraph linked by asterisk to the Schumer Box. It relies on our decision in *Hauk,* which it interprets to reject the notion "that TILA prohibits 'not only literal falsities, but also misleading statements.'" 552 F.3d at 1121 (quoting *Rossman v. Fleet Bank (R.I.) N.A.,* 280 F.3d 384, 391 (3d Cir. 2002)). We disagree with this reading of *Hauk.*

By parting ways from the "Third Circuit's expansive reading of Regulation Z," *id., Hauk* did not condone misleading disclosures. It simply rejected the argument that TILA liability could be based on disclosures that were misleading about anything at all – what it called "'misleading' in the abstract." *Id.* It did not hold that a creditor was allowed to mislead

consumers about information that TILA specifically requires be disclosed. *Hauk* held that a creditor does not violate TILA merely by offering a promotional APR to a consumer who the creditor knows is ineligible for the promotional APR, as long as the conditions for imposing the higher nonpromotional APR are properly disclosed. An undeclared intent to impose the higher APR is not included in the information TILA and Regulation Z require to be disclosed. *See id.* at 1120-22.

By contrast, TILA and Regulation Z do require a Schumer Box to disclose credit card APRs. 15 U.S.C. § 1637(c)(1)(A)(i)(I); 12 C.F.R. § 226.5a(b)(1). This disclosure must be clear and conspicuous, 15 U.S.C. § 1632(a); 12 C.F.R. § 226.5(a)(1), which, for purposes of credit card solicitations, is defined in the official staff commentary to Regulation Z as "in a reasonably understandable form and readily noticeable to the consumer." 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1; *see also Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883, 887 & n.4 (9th Cir. 2009) (noting that the official staff commentary is owed deference). Thus, Regulation Z prohibits a Schumer Box from making "misleading" APR disclosures, where "misleading" means a disclosure that a reasonable consumer will either not understand or not readily notice. *See Barrer,* 566 F.3d at 892 (adopting "reasonable cardholder" standard). Put differently, an APR disclosure that is not "clear and conspicuous" is *ipso facto* "misleading."

2

The Schumer Box and the paragraph linked to it by an asterisk described the APR as "fixed" and listed only three events under which the APR could increase. We conclude that Capital One cannot show that, as a matter of law, this disclosure is clear and conspicuous.

a

Although clarity and conspicuousness is a question of law, *see Barrer,* 566 F.3d at 892; *Rossman,* 280 F.3d at 395, empirical evidence is helpful in determining what a reasonable consumer will understand and readily notice. Fortunately, evidence on how a reasonable consumer will understand the term "fixed rate" is available from the Federal Reserve Board of Governors, the very agency tasked with implementing TILA. The Board has relied on that evidence in promulgating a new regulation that generally prohibits creditors from using the term "fixed." *See United States v. Woods,* 335 F.3d 993, 1001 (9th Cir. 2003) (noting that under 44 U.S.C. § 1507, the Federal Register must be judicially noticed). Where such persuasive and directly relevant evidence is available, armchair empiricism is comparatively unhelpful in determining how a reasonable consumer will read a solicitation.

In 2006, the Board retained a research firm to conduct consumer testing and design improved credit card disclosures based on the results of the testing.

See Macro Int'l Inc., *Design and Testing of Effective Truth in Lending Disclosures* 1 (2007), *available at* http://www.federalreserve.gov/dcca/regulationz/20070523/Execsummary.pdf. The firm prepared model credit card disclosures and conducted several rounds of interviews of credit cardholders. Those recruited to participate in the study were intended to represent the full range of demographic characteristics and financial experience in the cardholding public. *Id.* at 4, 17; *see also id.* app. A.

In the early rounds of interviews, the study found that "participants frequently assume that a rate that is labeled 'fixed' cannot be changed for any reason." *Id.* at 33; *see also id.* at 10 ("When asked to define what a 'fixed' rate was, most participants said that it was a rate that would not change."); *id.* at 30 ("When asked what it meant if a rate was labeled 'fixed,' most participants responded that these rates would not change for any reason."). So pervasive was this assumption that the term "fixed" was "removed from models in later rounds." *Id.* at 33.

Based on this research as well as later research by the same firm, the Federal Reserve Board promulgated revisions to Regulation Z that became effective July 1, 2010. *See* Truth in Lending, 74 Fed. Reg. 5244, 5246-48 (Jan. 29, 2009). Based on the research, the revisions specify that in the Schumer Box's APR disclosure,

> the term *fixed,* or a similar term, may not be used to describe [the annual percentage] rate

> unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.

Id. at 5401 (to be codified at 12 C.F.R. § 226.5(a)(2)(iii)). Under this regulation, a creditor may do what Capital One did -- describe an APR as "fixed," without specifying a period during which the APR will remain the same – only if the rate is unchangeable for the life of the card. In explaining the regulation, the Board categorized the term "fixed" as "[m]isleading" and stated that it had "found through consumer testing . . . that consumers generally believe a 'fixed' rate does not change. . . . [A]lthough creditors often use the term 'fixed' to describe an APR that is not tied to an index, consumers do not understand the term in this manner."[1] *Id.* at 5372-73 (cited by *id.* at 5272).

The new regulation did not become effective until after the events giving rise to this litigation, and thus

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[1] In explaining why its new regulation generally prohibits the word "fixed" in a Schumer Box, the Board refers the reader to its "decision with respect to use of the term 'fixed' in an advertisement." 74 Fed Reg. at 5272 That decision restricts the use of "fixed" in an advertisement, classifying it as a "misleading term " *See id.* at 5372.

The "index" the Board refers to in its new regulation is a publicly available measure of the cost of funds (for example, the federal funds rate). *See Consumers Union of U.S., Inc v. Fed Reserve Bd.*, 938 F 2d 266, 267-68 (D.C. Cir. 1991)

does not bind us. The form of Regulation Z that governs this case, however, does prohibit disclosures that a reasonable consumer will not understand. 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. The new regulation was adopted because the agency that implements TILA, relying on empirical evidence, concluded that describing an APR as "fixed" is misleading to reasonable consumers. What was misleading in 2006 and 2007, when the consumer studies were conducted, was also misleading in 2004, when Rubio received Capital One's solicitation. The new regulation and the empirical studies it relies on are therefore relevant and informative for this case. For "even where not binding," an agency's interpretation of a statute "certainly may influence courts facing questions the agenc[y] ha[s] already answered." *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 941 (9th Cir. 2008) (citation and quotation marks omitted).

Here, the Board has concluded that "fixed" is "generally" interpreted to mean that the rate will not be changed and that the creditor has not reserved the right to change it at a later date. 74 Fed. Reg. at 5373. We need not go so far as to decide how "fixed" is *generally* interpreted. But the Board's conclusion and the study on which it relies certainly persuade us that "fixed" can *reasonably* be interpreted to mean "unchangeable." For that reason, it is not "clear and conspicuous" to describe an APR as "fixed" when the creditor has reserved the right to change the APR for any reason.

Our decision does not make the Board's new regulation retroactive. The Board promulgated its new regulation because, after surveying consumers, it concluded "fixed" was misleading. That is why the new regulation is relevant and helpful: TILA has *always* prohibited misleading APR disclosures. Our holding is simply a concrete application of that prohibition.

It is argued that this appeal should be remanded for factual development because "fixed" can also reasonably be interpreted to mean "not tied to an index." *See* Concurrence and Dissent at 1208-09. But it is precisely because reasonable consumers can interpret an ambiguous disclosure in more than one way that such a disclosure cannot be clear and conspicuous. *See, e.g., Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 808 (7th Cir. 2001). Furthermore, because TILA is liberally construed in favor of the consumer and strictly enforced against the creditor, *Jackson,* 890 F.2d at 120, any misleading ambiguity – any disclosure that a reasonable person could read to mean something that is not accurate – "should be resolved in favor of the consumer." *Rossman,* 280 F.3d at 394.

As a final argument that the term "fixed" cannot be misleading, Capital One also relies on the official staff commentary to Regulation Z, which appears to use "fixed" to mean "not tied to an index" rather than "unchangeable." *See* 12 C.F.R. pt. 226 supp. I, para. 5a(b)(1), cmt. 5. We find this contention unpersuasive. The staff commentary to Regulation Z is intended to

guide regulated firms and the courts. *See id.* pt. 226 supp. I, intro. cmt. 1. There is nothing in the staff commentary to indicate that its *internal* use of "variable" and "fixed" defines how a reasonable consumer would interpret the words. As the Board has concluded, the best evidence on that question comes from the consumer studies indicating that many reasonable consumers do interpret the term "fixed" as "unchangeable."

b

Capital One, however, argues that it cleared up any misunderstanding the term "fixed" may have produced by explicitly listing three conditions under which the APR could change and by adding the statement, "[m]y Agreement terms (for example, rates and fees) are subject to change." We do not agree that this statement made Capital One's disclosure clear and conspicuous as a matter of law.

In the minds of a significant number of consumers, the term "fixed" means "unchangeable." When reading Capital One's Schumer Box against that meaning, reasonable consumers could conclude that the APR was "unchangeable" except for the three exceptions. They could conclude that Capital One explicitly mentioned the three conditions *precisely because* they were the only reasons that the APR could change. Our analysis on this point comports with the Third Circuit's decision in *Roberts v. Fleet Bank (R.I.), N.A.*, 342 F.3d 260, 266-67 (3d Cir. 2003).

Unlike the three triggering conditions, the statement, "[m]y Agreement terms (for example, rates and fees) are subject to change," was placed outside the Schumer Box and was not linked to it by asterisk. We assume for the sake of argument that in deciding whether a Schumer Box disclosure was clear and conspicuous, we can take into account statements outside the Schumer Box and not linked to it by an asterisk.[2] Even under this assumption, Capital One's argument fails. There was nothing in the statement, "[m]y Agreement terms . . . are subject to change," to indicate that the APR was "subject to change" for reasons *other* than the three reasons the Schumer Box discloses. A reasonable consumer, having concluded from reading the Schumer Box that the APR could change only for the three reasons expressly enumerated, could have interpreted the outside-the-Box statement to mean that the APR was "subject to change" exclusively for those three reasons. In so holding, we again follow the Third Circuit. *Roberts*, 342 F.3d at 268.

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[2] TILA and Regulation Z do not merely require that a solicitation disclose each APR that may be used to compute a credit card's finance charge. *See* 15 U.S.C. § 1637(c)(1)(A)(i); 12 C.F.R. § 226.5a(b)(1). They also require that this disclosure be "in the form of a table," that is, disclosed by means of the Schumer Box. 15 U.S.C. § 1632(c)(2)(A); 12 C.F.R. § 226.5a(a)(2)(i). Allowing disclosures made outside the Box to cure a Schumer Box's unclear or inconspicuous APR disclosure would seem to allow creditors to evade the tabular requirement.

At issue in this case is not Capital One's "obligation to disclose the change-in-terms provision, but its obligation to disclose the APR" clearly and conspicuously. *Id.* at 267. Rubio has stated a TILA claim not because Capital One failed to disclose its unqualified right to change the terms of the Cardholder Agreement, but rather because Capital One has failed to show as a matter of law that it made its APR disclosure "in a reasonably understandable form and readily noticeable to the consumer." 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. We therefore reverse the district court's dismissal of Rubio's TILA claim.

III

Rubio alleges that Capital One's solicitation also violated the UCL, which prohibits "unfair competition," defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200 (West 2008). A business act or practice may violate the UCL if it is either "unlawful," "unfair," or "fraudulent." Each of these three adjectives captures "a separate and distinct theory of liability." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009) (citing *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 85 Cal. Rptr. 2d 301, 316 (Ct. App. 1999)). According to Rubio, the solicitation she received violated the UCL under all of these theories of liability. Capital One responds that Rubio lacks standing to assert a UCL claim, and even if she had standing, her claim fails on its merits.

A

To assert a UCL claim, a private plaintiff needs to have "suffered injury in fact and . . . lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. This provision requires Rubio to show that she has lost "money or property" sufficient to constitute an "injury in fact" under Article III of the Constitution,[3] *see Birdsong v. Apple, Inc.*, 590 F.3d 955, 959-60 (9th Cir. 2009), and also requires a "causal connection" between Capital One's alleged UCL violation and her injury in fact, *Hall v. Time Inc.*, 70 Cal. Rptr. 3d 466, 471-72 (Ct. App. 2008).

Rubio has alleged a loss of money or property. When Capital One increased the APR from 6.99% to 15.9%, it gave Rubio a choice either to close the account and pay off the outstanding balance, or to keep the account open and accept the increased APR. Rubio does not allege which choice she accepted, though either would cause a loss of money or property. If she closed the account, she would have suffered a monetary loss by losing the credit that Capital One extended. *White v. Trans Union, LLC*, 462 F. Supp. 2d 1079, 1084 (C.D. Cal. 2006) (ruling that damage to

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[3] Standing under the UCL requires a particular kind of injury in fact – loss of "money or property." *See Troyk v. Farmers Group, Inc*, 90 Cal Rptr. 3d 589, 625 n 31 (Ct. App. 2009). By contrast, Rubio has standing to bring her TILA claim simply because she "suffered the loss of a statutory right to disclosure." *DeMando v. Morris*, 206 F.3d 1300, 1303 (9th Cir 2000)

credit was loss of money or property). If she kept her account open, she would have accepted a higher APR and thus also lost money. *See Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589, 624-25 (Ct. App. 2009) (holding that payment of extra money as a result of the defendant's action was sufficient for standing). This "actual economic injury" is enough to create standing under the UCL. *Aron v. U-Haul Co. of Cal.*, 49 Cal. Rptr. 3d 555, 559 (Ct. App. 2006); *cf. Birdsong*, 590 F.3d at 961 (holding that hypothetical injury was insufficient for standing).

Rubio has also alleged a causal connection between Capital One's solicitation and the Hobson's choice she faced. Because Rubio alleges that she entered into a credit card agreement with Capital One due to the solicitation's promise of a "fixed" APR, the choice she faced in August 2007, when she learned of the APR increase, was "a result of" Capital One's alleged UCL violation.

B

Rubio has standing to assert her UCL claim. We now consider the merits of the claim under the "unlawful," "fraudulent," and "unfair" prongs of the UCL.

By properly alleging a TILA violation, Rubio has also alleged a UCL violation under the prong of the UCL that prohibits "unlawful" business acts or practices. *See Velazquez v. GMAC Mortgage Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008); *Troyk*, 90 Cal. Rptr. 3d at 614.

Rubio has also alleged a violation of the "fraudulent" prong of the UCL. As in TILA, this prong of the UCL is "governed by the reasonable consumer test": a plaintiff may demonstrate a violation by "show[ing] that [reasonable] members of the public are likely to be deceived." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citations and quotation marks omitted). This deception need not be intended. *See In re Tobacco II Cases*, 207 P.3d 20, 29 (Cal. 2009). As we have explained above, a reasonable consumer was indeed likely to be deceived by Capital One's solicitation.

Finally, Rubio has stated a claim under UCL's "unfair" prong. California appellate courts disagree on how to define an "unfair" act or practice in the context of a UCL consumer action. *See generally Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735-36 (9th Cir. 2007). Under the balancing test to which some courts adhere, Rubio may be able to prove facts showing that "the harm to the consumer" from Capital One's solicitation outweighed the solicitation's "utility." *Id.* at 735. She may, for example, be able to show that removing the term "fixed," an action that would have cost Capital One nothing, could have prevented consumer confusion. Under the alternative test, which requires a plaintiff to show that a practice violates public policy as declared by "specific constitutional, statutory or regulatory provisions," *Gregory v. Albertson's, Inc.*, 128 Cal. Rptr. 2d 389, 395 (Ct. App. 2002), Rubio has stated a claim by successfully alleging a TILA violation.

We therefore reverse the district court's dismissal of Rubio's UCL claim.

IV

The district court also dismissed Rubio's claim for breach of contract. She alleges that by stating that the credit card's APR was "fixed" at 6.99%, but later increasing the APR to 15.9%, Capital One breached its contract with her. Rubio's legal theory is that Capital One's solicitation was an offer and her application an acceptance.

Rubio has not stated a breach-of-contract claim. Under California law, which according to Rubio controls, a binding offer "is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and *will conclude it.*" *Donovan v. RRL Corp.*, 109 Cal. Rptr. 2d 807, 27 P.3d 702, 709 (Ct. App. 2001) (emphasis added, citation and quotation marks omitted). There is a binding offer only if it is reasonable to conclude, based on "all the surrounding circumstances," that acceptance will leave nothing further to negotiate or do before the contract is effective. *Id.*

It would have been unreasonable to believe that Capital One's solicitation was a binding contractual offer. As the district court noted, the solicitation was generally described as an "invitation" or "application," and it listed a number of contingencies under which her application could be rejected. The

solicitation did include a heading entitled "TERMS OF OFFER," but the language of that section made it clear that sending in the application, by itself, did not consummate the contract: "I hereby apply to Capital One Bank . . . for a credit card account. . . . I will receive the Capital One Customer Agreement and am bound by its terms and future revisions thereof." In *Lopez v. Charles Schwab & Co.,* the plaintiff had filled out an application form to open an account, which contained the similar statement, "I hereby request that [Schwab] open a brokerage account. . . . I agree to read and be bound by the terms of the applicable Account Agreement." 13 Cal. Rptr. 3d 544, 549 (Ct. App. 2004). The court of appeal concluded that "[t]his language . . . indicates Lopez did not expect that filling out the application would conclude her bargain with Schwab. . . ." *Id.* The solicitation and application do not constitute an enforceable contract. The language in Capital One's solicitation is indistinguishable in all relevant aspects from the language in *Lopez* and did not constitute a binding offer.

Rubio also argues that the Cardholder Agreement was unconscionable. Under California law, however, unconscionability is an affirmative defense, *Dean Witter Reynolds, Inc. v. Superior Court,* 259 Cal. Rptr. 789, 794 (Ct. App. 1989), not a cause of action, *Cal. Grocers Ass'n v. Bank of Am.,* 27 Cal. Rptr. 2d 396, 403-04 (Ct. App. 1994). Rubio as plaintiff cannot assert unconscionability as an independent claim for relief. We affirm the district court's dismissal of Rubio's claim for breach of contract.

V

We affirm the district court's dismissal of Rubio's breach-of-contract claim but reverse its dismissal of her claims under TILA and the UCL. We remand for further proceedings consistent with this opinion. The parties shall bear their own costs.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

GRABER, Circuit Judge, concurring in part and dissenting in part:

I respectfully concur in part[1] and dissent in part.

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[1] I agree with the majority that the solicitation did not constitute an offer Plaintiff argues that California law governs the parties' agreement. But even under California law, "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and *will conclude it*." *Donovan v. RRL Corp.*, 27 P.3d 702, 709 (Cal 2001) (emphasis added) (internal quotation marks omitted) Here, the solicitation made it clear that sending in the application did not, by itself, consummate the agreement The solicitation listed a number of contingencies under which Plaintiff's application could be rejected *See Lopez v Charles Schwab & Co.*, 13 Cal. Rptr. 3d 544 (Ct. App. 2004) (holding that an application containing the statement, "I hereby request that [the defendant] open a brokerage account," did not create an enforceable contract).

In addition, because I too would hold that Plaintiff has stated a TILA claim – although I would decline to hold that the disclosure is clear as a matter of law – I agree with the majority

(Continued on following page)

The district court dismissed this case on the pleadings, reasoning that the required disclosure sufficed as a matter of law. The majority holds that the disclosure is inadequate as a matter of law. In my view, the clarity of the disclosure should be considered an issue of fact for the trier of fact. While a finder of fact could conclude, as the majority does, that the disclosure was unclear, for the reasons explained below I think that a finder of fact also could conclude that the disclosure was clear.

Defendant Capital One Bank told Plaintiff Raquel Rubio that she could apply for a credit card at "a fixed rate of 6.99%." Approximately three and a half years after Plaintiff obtained a Capital One credit card carrying the 6.99% rate, Defendant raised the annual percentage rate ("APR") to 15.9%. Defendant increased the APR because market interest rates had risen, rather than because of any irregularities in Plaintiff's payments or her use of the account. Was there a clear and conspicuous disclosure of the potential for raising the APR, for the purposes of the Truth In Lending Act ("TILA"), when the solicitation advertised "a fixed rate of 6.99%" but stated on *the same page* that the rates and fees were "subject to change"? In my view, there was.

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that the district court erred by dismissing the California unfair competition claim.

In 2004, Defendant mailed Plaintiff a solicitation to open a credit card account. The solicitation began:

> YOU HAVE BEEN PRE-SELECTED FOR THIS OFFER FOR A CAPITAL ONE PLATINUM MASTERCARD FEATURING A LOW 6.99% FIXED APR ON BALANCE TRANSFERS AND PURCHASES, A CREDIT LINE UP TO $20,000* AND NO ANNUAL MEMBERSHIP FEE. *THIS IS NOT AN INTRODUCTORY RATE!*

The solicitation repeatedly referred to the 6.99% APR as "fixed." The "Schumer box," an informative table required by federal regulations, described the "**ANNUAL PERCENTAGE RATE** (APR) for purchases*" as "A fixed rate of **6.99%**." The asterisk directed the reader lower on the page, where the solicitation stated:

> *All your Annual Percentage Rates (APRs) are subject to increase if any of the following conditions ("Conditions") occur: (i) you fail to make a payment to us when due; (ii) your account is overlimit; (iii) or your payment is returned for any reason. All APRs will change with the beginning of the billing period after the period in which the condition occurred. The first time any of the Conditions occur, your purchase and special transfer APRs (if applicable) may be increased to a rate of 12.9% **ANNUAL PERCENTAGE RATE** (0.03534% daily periodic rate). If any of the Conditions occur twice within any 6-month period, all of your APRs may be increased to

a rate of 25.9% **ANNUAL PERCENTAGE RATE** (0.07096% daily periodic rate).

Farther down on the same page, the "TERMS OF OFFER" included this provision: "I will receive the Capital One Customer Agreement and am bound by its terms and future revisions thereof. My Agreement terms (for example, rates and fees) are subject to change."

Plaintiff responded to the credit card solicitation and, in March 2004, she received a cardholder agreement from Defendant. The agreement similarly provided that Defendant reserved the right to "amend or change any part of your Agreement, including periodic rates and other charges, or add or remove requirements . . . at any time." In August 2007, Defendant mailed Plaintiff a notification that the APR on her credit card was about to increase to 15.9% unless she halted her use of the card and made no further charges on it. The notice explained the change in the future lending rate as simply a response to changing market interest rates. "In light of rising interest rates over the past few years and the rate currently applied to your account balance, the APRs on your account are about to increase."

We have construed TILA and Regulation Z to prohibit disclosures that are either inconspicuous or opaque to a reasonable consumer. "Clear and conspicuous disclosures . . . are disclosures that a reasonable cardholder would notice *and understand*." *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883, 892 (9th Cir.

2009) (emphasis added). Our inquiry is not whether additional disclosure would be useful to consumers but, rather, whether the disclosures that were made complied with the requirements of TILA and Regulation Z. *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1121 (9th Cir. 2009).

In other words, here, is the disclosure accurate and clear?[2] In my view, a reasonable trier of fact could find that it is. The term "fixed" accurately describes an interest rate that is not linked to an external index and is not designed to expire or reset automatically at any particular point in time. The commentary to Regulation Z distinguishes between a "fixed-rate account" and a "variable-rate account." *See* 12 C.F.R. pt. 226 supp. I, para. 5a(b)(1), cmt. 5 (contrasting disclosures required for the different types of accounts). A "variable-rate account" is one in which "rate changes are part of the plan and are tied to an index or formula." *Id.* at cmt. 2. By implication, then, a fixed-rate account is one that does not share those characteristics. The account advertised by Defendant here did not feature rate changes tied to an index or

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[2] Plaintiff's brief does not argue that the disclosure is inconspicuous. In *Barrer*, we held that a disclosure was not conspicuous when "the change-in-terms provision appear[ed] . . . five dense pages after the disclosure of the APR" and was "neither referenced in nor clearly related to the 'Finance Terms' section." 566 F.3d at 892. Here, the APR disclosure and the general reservation of rights appear on the same page, in a legible font. A reasonable consumer would have noticed them; they are conspicuous.

formula as a part of the credit plan. That is, it was a fixed-rate account. The disclosure was accurate in describing the rate as "fixed."

Nor did Defendant's general reservation of rights – the provision stating that rates and fees were subject to change – transform the accurate term "fixed" into an inaccurate disclosure. 12 C.F.R. pt. 226, supp. I, para. 6(a)(2), cmt. 2. The account still did not involve *pre-planned* rate changes, even if Defendant retained the right to adjust the rate later in response to general market conditions.[3] The disclosure was accurate.

The crux of this dispute, then, is the *clarity* of the disclosure. Would a reasonable consumer understand that Defendant may alter the "fixed" APR because market conditions change? In my view, this should be a question of fact. Moreover, I conclude that a fact-finder reasonably could find that the answer to the question is "yes" because, on the same page as the statement of the 6.99% fixed rate, the solicitation informed the consumer that "Agreement terms (for example, rates and fees) are subject to change." That

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[3] The general reservation clause was permissible and need not have explained that Defendant might change the APR if market conditions changed. The commentary to Regulation Z anticipates that credit agreements may contain a general reservation clause. 12 C.F.R. pt. 226, supp. I, para. 6(a)(2), cmt. 2. And adequate disclosure under Regulation Z does not require that creditors must "specify the general circumstances under which they anticipate[] changing terms." *Barrer*, 566 F.3d at 891 n.9.

is to say, a fact-finder permissibly could find that a reasonable consumer would understand from the disclosure here that the "fixed" APR might go up or down in the future.

An average consumer might well understand that a "fixed" rate on a credit card does not mean that the rate is "permanent" or "forever" when the issuer expressly and simultaneously reserves its right to "change" its "rates" later. Reasonable consumers know that interest rates fluctuate – sometimes dramatically – over time; no reasonable consumer expects that short-term borrowing rates will remain static forever. Reasonable consumers might well understand that, as market conditions change, the APR available from a credit card company *that has explicitly reserved its right to adjust rates prospectively* may change as well.[4]

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[4] Indeed, when Defendant formerly sought to entice customers to open an account with precisely that "forever" feature, it described the credit in very different terms. Fifteen years ago, Defendant advertised a card with a "Lifetime APR" and told consumers that they would "receive a low fixed APR of 10.9% – for life!" *DeMando v. Morris*, 206 F.3d 1300, 1301-02 (9th Cir. 2000) (emphasis omitted). The solicitation trumpeted: "You will keep this low fixed rate as long as your account remains in good standing [Y]ou will never have to shop for another credit card again!" *Id.* at 1302. By contrast, the solicitation at issue here lacks any reference to keeping the advertised interest rate "for life" or for the consumer's "lifetime," nor does it promise that the rate will stay the same "as long as" the account remains in good standing

Plaintiff contends that a reasonable consumer, even if aware that the fixed rate was not guaranteed permanently, would be confused by the solicitation's list of three conditions that would trigger a higher APR. Plaintiff argues that the customer reasonably might think that those three conditions are the *only* ones that permit a rate increase. A reasonable trier of fact could find this argument unpersuasive.

First, the statement that the APR is "subject to change if any of the following conditions ('Conditions') occur" notably lacks a qualifying term such as "only," "exclusively," or "solely." An average consumer might well understand the difference between saying that her rate will increase if she misses a payment and saying that her rate will increase *only* if she misses a payment.

But more importantly, a reasonable consumer would not necessarily believe that a "fixed APR" on a credit card whose issuer *has reserved its right to change rates* is a promise to keep the same interest rate forever so long as the cardholder behaves well. The warning that specific undesirable acts *by the cardholder* will lead to a higher interest rate does not necessarily suggest that the account will otherwise be shielded from *global economic conditions*.

What, then, should the result be when the majority's proposed understanding of the disclosure's clarity is not the only reasonable understanding? In my view, the better answer to that question is to remand the case for fact-finding.

There seems to be a circuit split regarding the question whether the clarity of a disclosure is a question of law or fact. The Seventh Circuit holds that this is a question of law. *Hamm v. Ameriquest Mortgage Co.*, 506 F.3d 525, 529 (7th Cir. 2007).[5] By contrast, the Third Circuit, in a case on which the majority relies heavily in other respects, appears to treat the clarity of a disclosure as a question of fact.[6]

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[5] Although we have held that conspicuousness of a TILA disclosure is a question of law, *Am. Gen. Fin., Inc. v. Bassett (In re Bassett)*, 285 F.3d 882, 885 (9th Cir. 2002), we have not addressed how to treat the *clarity* of a disclosure. The reasons why we treat conspicuousness as a question of law do not compel us to treat clarity similarly. In *In re Bassett*, we borrowed the definition of conspicuousness from the Uniform Commercial Code ("UCC"). *Id.* at 884. The UCC expressly provides that conspicuousness is a decision for the court. U.C.C. § 1-201(b)(10). I am aware of no comparable UCC provision regarding clarity. We also explained in *In re Bassett* that "subjecting conspicuousness to fact-finding would introduce too much uncertainty into the drafting process." 285 F.3d at 885. Whether or not it is actually true that a court's determination regarding conspicuousness is more predictable than a fact-finder's, it is manifestly not true with respect to clarity. The assessment of a reasonable consumer's understanding of a disclosure would be more accurate – and hence more predictable – if made by an informed fact-finder than if made by a court in the abstract.

[6] In *Rossman v. Fleet Bank (R.I.) National Ass'n*, 280 F.3d 384, 394-95 (3d Cir. 2002), the Third Circuit implicitly treated the accuracy of a disclosure as a question of law. But the court did not discuss that issue, and it is not clear whether the court held that the disclosure was inaccurate because, in that record, no issue of fact existed or, instead, because the issue is always one of law.

In *Roberts v. Fleet Bank (R.I.) National Ass'n*, 342 F.3d 260, 263 (3d Cir. 2003), a consumer received a solicitation advertising a "7.99% Fixed APR," which stated that the APR was "NOT an introductory rate" and that "[i]t won't go up in just a few short months." There, the issuer raised the cardholder's rate after 13 months. *Id.* at 264. As in this case, the *Roberts* solicitation listed two specific circumstances in which the fixed rate would increase – failure to meet payment requirements and closure of the account – and neither of those events had occurred. *Id.* at 263-64.

In *Roberts,* the Third Circuit "recognize[d] that a fixed rate is not necessarily permanent." *Id.* at 268 n.3. But it held that the solicitation *could* lead a reasonable consumer to be "confused about the temporal quality of the offer" and to conclude that rates "are subject to change only for the two reasons outlined." *Id.* at 268. As a result, the court held "that *a question of fact exists* as to whether Fleet made any misleading statements in the mailing" and whether it failed to disclose information clearly, as TILA requires. *Id.* at 269 (emphasis added).

The majority's reliance on evidence outside the pleadings underscores the appropriateness of fact-finding in a case such as this. The majority relies on the results of research done two years after Defendant sent the solicitation at issue here. The evidence on which the majority relies consists of an executive summary of three rounds of interviews with a total of 25 individuals who were shown mock credit card solicitations. *See* Macro Int'l Inc., Design and Testing

of Effective Truth in Lending Disclosures, app. A, tbl. 1 (2007), *available at* http://www.federalreserve.gov/dcca/regulationz/0523/summary.pdf [hereinafter Executive Summary] (showing that researchers interviewed nine consumers in Baltimore, nine in Kansas City, and seven in Denver). This small sample of consumers was not intended to be – and was not – representative of the card-holding public, even though the majority is correct that it was intended to represent the *range* of those consumers.[7] *Id.* at 17, app. A. The executive summary does not reveal how many of the consumers in two rounds of the interviews misinterpreted the term "fixed" as used in the experimental solicitations. *Compare id.* at 22 (stating that six participants in Kansas City misunderstood the term), *with id.* at 10, 30 (stating that "most participants" in Baltimore and in Denver misunderstood the term).

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[7] A representative sample is one in which the frequency or distribution of some trait corresponds to that trait's frequency or distribution in the population being sampled. *See McGraw-Hill Dictionary of Scientific and Technical Terms* 1789 (6th ed. 2002) (defining "representative sample" as "[a] sample whose characteristics reflect those of the population from which it is drawn"). To illustrate the distinction, consider that a representative sample of college students would contain primarily individuals between 18 and 30 years of age, because most college students are young adults. By contrast, a sample that represented the *range* of college students might be made up of a precocious fourteen-year-old, a conventional nineteen-year-old, and an energetic senior citizen. Research on the former, representative sample would predict more accurately the behavior of college students because fourteen-year-olds and senior citizens are relatively uncommon among college students.

Thus, the majority accepts what may be as few as 15 unrepresentative consumers as "persuasive." Maj. op. at 10395. I am dubious of that assessment.[8]

Furthermore, I am concerned by such heavy reliance on evidence that has bypassed the adversarial process. No party mentioned this research in briefing or at oral argument. Consequently, we are entirely ignorant of whether there are other flaws in the study that Defendant might bring to our attention if it had the opportunity to do so. Nor do we know if other research has yielded countervailing results.

Nothing in the former regulations suggested that the agency deemed the term "fixed" to be misleading. The researchers initially included it in their experimental solicitations, and none of the "key research questions" listed in the executive summary suggests that these experts suspected that the term would be misunderstood. Executive Summary at 2-3. In fact, even the researchers seem to have been surprised by their results regarding the term: they were slower to remove the term from subsequent rounds of interviews than they were to act on some of their other findings. The researchers continued to use the term "fixed" for three rounds of interviews, *id.* at iii, while

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[8] My discomfort is not assuaged by the fact that the Federal Reserve Board of Governors later cited this research to justify regulating use of the term "fixed." 74 Fed. Reg. 5244, 5272, 5372-73 (Jan. 29, 2009). The evidence that underlies a minor prospective change need not always be as persuasive as that required to hold a credit card company liable for its past actions

they made several other changes to the experimental solicitations after the first and second rounds of interviews, *id.* at 14, 26-27.

In summary, a reasonable trier of fact could find that Defendant's solicitation accurately, conspicuously, and clearly disclosed the terms of its credit card account. What happens in an insurance bad-faith case (to take just one example) when the pleadings (or summary judgment documents) allow a reasonable trier of fact to find *either* bad faith *or* good faith denial of coverage? The case proceeds to trial. The same is true for unfair trade practices, medical negligence, punitive damages, and nearly every other kind of claim – that is, whether or not the claim is statutory, and whether or not it involves assessing someone's state of mind.

In most areas of law, then, when reasonable minds can differ about a factual conclusion, an appellate court does not substitute itself for a finder of fact. I would apply the usual rule to the question of clarity of a TILA disclosure. I would, therefore, hold that the pleading is sufficient to state a claim but that issues of fact remain for resolution on remand.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAQUEL RUBIO, on behalf of herself and all other similarly situated, Plaintiff, v. CAPITAL ONE BANK (USA), N.A., Defendant.	CV 07-6766 ABC (CWx) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) (Filed Aug. 11, 2008)

Pending before the Court is Defendant Capital One's Motion to Dismiss Second Amended Complaint and to Strike, filed on May 19, 2008. Plaintiff Raquel Rubio filed an Opposition on June 9, 2008, and Defendant filed a Reply on June 23, 2008. Oral argument was heard on August 11, 2008. Upon considering the materials submitted by the parties, the arguments of counsel, and the case file, the Court hereby **GRANTS** Defendant's Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

This class action lawsuit arises out of Plaintiff Raquel Rubio's ("Plaintiff") contention that Defendant Capital One Credit Services, Inc.'s ("Defendant") wrongfully raised the annual percentage rate ("APR")

on the credit card it issued to her. On March 13, 2008, the Court issued an Order ("March 13 Order") dismissing with prejudice Plaintiff's breach of contract claim. Thereafter, Plaintiff filed a Second Amended Complaint ("SAC") refashioning her claim one for violations of the Truth in Lending Act (TILA") 15 U.S.C.§ 1601 *et seq.*, and for violations of California's Unfair Competition Law, California Business & Professions Code § 17200 *et seq.*.

Specifically, in February 2004 Plaintiff received a mail solicitation (SAC Ex. A) from Defendant offering a "low 6.99% fixed [Annual Percentage Rate ("APR")] on balance transfers and purchases;" the solicitation emphasized "this is not an introductory rate." (SAC ¶ 11.) In the so-called "Schumer Box" portion of the disclosures, Defendant characterized the APR as "[a] fixed rate of 6.99% (0.01915% daily periodic rate)." (SAC Ex. A.) That APR entry in the Schumer Box is marked with an asterisk directing the reader to the correspondingly-asterisked paragraph just below the Schumer Box identifying three conditions that may cause the APR to increase: "All your [APRs] are subject to change if any of the following conditions ('Conditions') occur: (i) you fail to make a payment to us when due; (ii) your account is overlimit; (iii) or your payment is returned for any reason." (SAC ¶ 12; SAC Ex. A.) Just below the asterisked text, there is a section entitled "TERMS OF OFFER," which includes the following term: "I will receive the Capital One Customer Agreement and am bound by by [sic] its terms and future revisions thereof. My Agreement terms

(for example, rates and fees) are subject to change." (SAC Ex. A, p. 20.)

In response to the solicitation, Plaintiff applied for and was issued a Capital One credit card, which she used until August 2007. (SAC ¶¶ 14-16.) However, on August 3, 2007, Plaintiff received notification from Defendant that, "In light of rising interest rates over the past few years and the rate currently applied to your account balance, the APRs on your account are about to increase" to 15.9%. (SAC ¶¶ 18-19.) The notice provided that Plaintiff could avoid the rate increase by cancelling her credit card and paying off the balance under the original APR. (SAC ¶ 20.)

Plaintiff alleges that the solicitation violated TILA because it "disclosed a fixed APR that was not subject to change unless one of the specified conditions mentioned in the solicitation occurred," yet Defendant later notified Plaintiff that it was going to increase her APR even though none of the three specified conditions occurred. (SAC ¶¶ 17, 43-46.) Because Defendant was going to raise the APR for a reason not identified in the solicitation, Plaintiff alleges that the solicitation disclosures were misleading and inaccurate in violation of TILA. (SAC ¶ 48.) Stated differently, Plaintiff contends that she was "unaware that [Defendant's] promised fixed APR was in fact temporal in nature, according to [Defendant], and was subject to change even if the aforementioned conditions were not met." (SAC ¶ 27.) Plaintiff also asserts a tag-along claim for violation of California's Unfair Competition Law ("UCL").

Defendant now moves to dismiss the SAC, asserting that, as a matter of law, the solicitation – whose contents are undisputed – complied with TILA. As such, Plaintiff's TILA claim is not legally cognizable. Defendant also moves to dismiss the UCL claim. Plaintiff opposes, arguing that there is a disputed issue of fact as to whether the solicitation's disclosures were misleading and not "clear and conspicuous."

II. LEGAL STANDARD

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. *See* Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). "The Rule 8 standard contains 'a powerful presumption against rejecting pleadings for failure to state a claim.'" *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 969, 699 (9th Cir. 1988). To survive a 12(b)(6) motion, a complaint "does not need detailed factual allegations," but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1964-1965, 1968-1969

(2007) ("retir[ing]" the "no set of facts" language of *Conley v. Gibson*, 355 U.S. 41 (1957)).

In resolving a motion to dismiss, the Court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to plaintiff. *Id.* However, the Court need not accept as true any unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

In ruling on a 12(b)(6) motion, a court generally cannot consider material outside of the complaint (*e.g.*, facts presented in briefs, affidavits, or discovery materials). *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). A court may, however, consider exhibits submitted with the complaint. *Id.* at 453-54. Similarly, a court may consider documents that are not physically attached to the complaint but "whose contents are alleged in [the] complaint and whose authenticity no party questions." *Id.* at 454.

III. ANALYSIS

A. Plaintiff's TILA Claim

Plaintiff [sic] first claim for relief asserts that Defendant failed to make "clear and conspicuous" APR disclosures in solicitation materials, as required by

the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, and its implementing regulations 12 C.F.R. Pt. 226 ("Regulation Z") promulgated by the Federal Reserve Board ("Board") pursuant to statutory authority.

Specifically, Plaintiff argues that the use of the term "fixed," in the Schumer Box, to characterize the APR was misleading because it led her to believe that the APR "would undeniably remain at that rate throughout the entire time period she chose to utilize her CAPITAL ONE credit card, unless, one of the stated conditions above were to occur." (SAC ¶ 13.) As such, whether Plaintiff's claim is viable depends upon whether the term "fixed" may have the meaning that Plaintiff says she understood it to have. Relatedly, the Court must determine whether Defendant's inclusion of the three conditions below the Schumer Box was misleading such that Plaintiff could interpret them to be the only conditions that could cause an increase in the APR.

1. The Truth in Lending Act

Congress enacted the TILA in 1969. The stated purpose of the TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). In 1988, concerned that consumers

were still not receiving accurate information about the potential costs of credit cards, Congress strengthened the TILA's protections for credit card consumers through enactment of the Fair Credit and Charge Card Disclosure Act, "a bill to provide for more detailed and uniform disclosure by credit and charge card issuers, at the time of application or solicitation, of information relating to interest rates and other costs which may be incurred by consumers through the use of any credit or charge card." S.Rep. No. 100-259, at 1 (1988), reprinted in 1998 U.S.C.C.A.N. 3936, 3937.

Congress delegated the responsibility of "prescrib[ing] regulations to carry out the purposes of" the TILA to the Federal Reserve Board. 15 U.S.C. § 1604(a). In response to this mandate, the Board promulgated "Regulation Z," 12 C.F.R. § 226, and it also published a comprehensive "Official Staff Interpretation," 12 C.F.R. pt. 226 Supp. I, commonly referred to as the Official Staff Commentary (hereinafter, "O.S.C."). Both of these measures were published in accordance with "the broad powers that Congress delegated to the Board to fill gaps in the statute." *Ortiz v. Rental Management, Inc.*, 65 F.3d 335, 339 (3d Cir. 1995). In light of Congress' explicit delegation of authority to the Board, courts must defer broadly to the Board's interpretation of the statute and its own regulations. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (noting that because TILA is a complicated act, such deference is necessary). *See generally Chevron, U.S.A., Inc. v.*

Natural Res. Def. Council, et al., 467 U.S. 837, 844-45 (1984).

At issue in this case is TILA's requirement that a credit card provider disclose certain information in "direct mail applications and solicitations," including "annual percentage rates." 15 U.S.C. § 1637(c)(1)(A)(i). The Board's regulations also require "[a] credit card issuer" to disclose the applicable "annual percentage rate." 12 C.F.R. § 226.5a(b)(1) (requiring disclosure of "[e]ach periodic rate that may be used to compute the finance charge on an outstanding balance for purchases . . . expressed as an annual percentage rate."). TILA requires that information described in 15 U.S.C. § 1637(c)(1)(A), including "annual percentage rates," must be "clearly and conspicuously disclosed" in a "tabular format." 15 U.S.C. § 1632(a) and (c). Likewise, the Board's regulations mandate that disclosures required under 12 C.F.R. § 226.5a(b)(1) through (7) "be provided in a prominent location on or with an application or a solicitation, or other applicable document, and in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in Appendix G." 12 C.F.R. § 226.5a(a)(2). The Board's regulations also dictate that a "creditor shall make the disclosures required by this subpart clearly and conspicuously in writing." 12 C.F.R. § 226.5(a)(1). Hence, both TILA and the Board-promulgated regulations require a credit card issuer to disclose the applicable annual percentage rate clearly and conspicuously in a table; this table is commonly referred to as the "Schumer Box" after the

principal sponsor of the House bill, Congressman (now Senator) Charles Schumer. *Roberts v. Fleet Bank*, 342 F.3 [sic] 260, 263 fn. 1 (3d Cir. 2003).

"To effectuate [TILA's] purpose, '[e]ven technical or minor violations of the TLA [sic] impose liability on the creditor.' Thus, the Ninth Circuit has held that the TILA and accompanying regulations must be 'absolutely complied with and strictly enforced.'" *Phleger v. Countrywide Home Loans, Inc.*, 2007 WL 4105672, 4 (N.D. Cal. 2007) (*citing Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986). Furthermore, "[t]he accuracy demanded excludes not only literal falsities, but also misleading statements." *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n*, 280 F.3d 384, 390-391 (3d Cir. 2002) (internal citation omitted).

2. The *Roberts* Decision

Both parties devote considerable discussion to the Third Circuit's decision in *Roberts v. Fleet Bank*, 342 F.3 [sic] 260 (3d Cir. 2003). There, the Court reversed the district court's grant of summary judgment for the defendant on a TILA claim very similar to the TILA claim asserted herein. In relevant part, the Court found that, upon reviewing the contents of the Schumer Box alone, issues of fact existed as to whether the credit card issuer's solicitations were so misleading as to violate TILA and Regulation Z. The Court also held that solicitation materials other than those covered by TILA (such as disclosures made outside of the Schumer Box) may be considered in

determining whether the credit card issuer has met TILA's "clear and conspicuous" disclosure requirements.

The solicitation in issue in *Roberts* offered a "7.99% Fixed APR," stated that the fixed APR was "NOT an introductory rate," and promised that "[i]t won't go up in just a few short months." *Roberts*, 342 F.3d at 263. The Schumer Box disclosed a "7.99% APR," and listed two specific circumstances under which the rate could change: if the cardholder failed to make required payments or upon closure of the account. *Id.* at 263. These two conditions were stated again below the Schumer Box. The solicitation also included a section entitled "TERMS OF PREQUALIFIED OFFER," which included the statement "my Agreement terms (including rates) are subject to change." *Roberts*, 342 F.3d at 263.

Although neither party pointed this out in their memoranda, the disclosures in *Roberts* differ from the disclosures in this case in two material ways. First, in *Roberts*, the two conditions that could trigger a rate increase were listed *inside* the Schumer Box together with the APR. In determining that these disclosures may have been misleading, the Court specifically noted "[i]n the Schumer Box, [defendant] stated that the 7.99% APR could change in the event of nonpayment or closure of the account. [Defendant] listed no other conditions under which the 7.99% APR could change. We believe that it would be just as reasonable, if not more reasonable, for a consumer to conclude *from the information contained in the Schumer*

Box that the 7.99% APR could be changed only under the two listed circumstances . . . " *Roberts*, 342 F.3d at 266. It is clear from this language that the inclusion of the two conditions *within* the Schumer Box was one of the bases of the Court's determination that Plaintiff raised a triable issue of fact. Here, by contrast, the conditions that could cause the APR to increase were disclosed *outside* the Schumer Box (below it) not inside the Schumer Box. As discussed in further detail below, TILA and Regulation Z strictly limit what material may be included within the Schumer Box. Accordingly, because the Schumer Box in this case differs from the Schumer Box in *Roberts* with respect to the very term that forms one basis of Plaintiff's TILA claim, that aspect of the *Roberts* decision is not on point with this case and is therefore not persuasive.

Second, in determining that the statements outside the Schumer Box could have been misleading, the *Roberts* Court stated, "we agree with *Roberts* that the claims in the introductory letter that the 'fixed 7.99% APR' is 'NOT an introductory offer' and 'won't go up in just a few short months' could cause a reasonable consumer to be confused about the temporal quality of the offer." *Roberts*, 342 F.3d at 268. Plaintiff herein similarly claims to have been misled as to the temporal quality of the APR Defendant offered. However, in contrast with the assertion in *Roberts* that the rate "won't go up in just a few short months," in this case Defendant's solicitation is devoid of *any* temporal claims about the fixed rate. Based upon the

above-quoted sentence, it is clear that the *Roberts* Court relied on the defendant's vague temporal claim about the rate to find that the plaintiff raised an issue of fact. Because Defendant herein made no such claim, the facts of this case do not fall within that holding of *Roberts*.

Accordingly, even though *Roberts* and this case involve the same legal claims, because the solicitation in *Roberts* differs from the solicitation herein in material ways, the cases are factually distinguishable. As such, assuming *Roberts* was correctly decided, the Court cannot do as Plaintiff urges it and simply apply *Roberts*'s holding to this case.

3. Defendant's Schumer Box Disclosures

The disclosure that Plaintiff claims is misleading is Defendant's characterization of the APR as "[a] fixed rate of 6.99%." This disclosure was made inside the Schumer Box.

As stated above, TILA and the regulations require that the APR be disclosed inside the Schumer Box. By indicating, in the Schumer Box, that the offer was for "[a] fixed rate of 6.99%," Defendant's disclosure of the APR ostensibly complied with this requirement. Other APR-related Schumer Box disclosures required by TILA (in 15 U.S.C. 1637(c)) and Regulation Z (at 12 C.F.R. 226.5a) concern disclosures of variable APRs and introductory rates. A "variable" rate is one "under which rate changes are part of the

plan and are tied to an index or formula." O.S.C. § 226.6(a)(2), cmt. 2, at 411. *see also id.* § 226.6(a)(2), cmt. 2, at 411 (stating "the creditor's contract reservation to increase the rate without reference to such an index or formula (for example, a plan that simply provides that the creditor reserves the right to raise its rates) would not be considered a variable-rate plan for Truth in Lending disclosure purposes.") It is undisputed that the APR in issue here was not a "variable" rate: there is no allegation that it was tied to an index or formula. Similarly, it is undisputed that the APR herein was not an introductory rate, that is, one offered for a specific and limited period of time. Accordingly, none of the disclosures concerning variable or introductory rates is relevant here.

Plaintiff nevertheless claims that Defendant's use of the term "fixed" was misleading because she understood the term to mean that the APR was permanently fixed. Plaintiff further contends that the asterisked three conditions listed below the Schumer Box could reasonably be read to be the only conditions that could cause an increase in the APR. It is undisputed that the APR was raised 3 ½ years after Plaintiff opened her account despite use of the term "fixed" even though none of the three listed events occurred.

Although the term "fixed" is not expressly defined in TILA or Regulation Z, the term is used in contrast with the term "variable." "Fixed" in the context of an APR means not tied to an underlying interest rate index. *See Roberts*, 342 F.3d at 268 fn. 3

(noting that a fixed rate is not necessarily permanent, and noting that a fixed rate APR is not tied to other interest rates); *see also* O.S.C. § 226.6(a)(2), cmt. 2 at 411 (stating that a variable rate plan is one "under which rate changes are part of the plan and are tied to an index or formula.") Thus, the term "fixed" as it applies to APRs connotes no time element; rather, the term means only that the rate is not tied to an index or formula. And, unlike in *Roberts*, Defendant herein made no assertion that its use of the term "fixed" had any temporal quality. As such, the Court rejects Plaintiff's contention that "the word 'fixed' could cause a reasonable consumer to be confused about the temporal quality of the offer." (Opp'n 10:4-6.) Defendant's use of the term "fixed" within the Schumer Box was therefore not misleading. Plaintiff has identified no other disclosure in the Schumer Box that it contends is misleading or not "clear and conspicuous."

4. Statements Outside the Schumer Box

Plaintiff also argues that statements outside the Schumer Box render the disclosure misleading. As an initial matter, Plaintiff takes inconsistent positions concerning whether statements outside the Schumer Box are relevant to its claims or may properly be considered in the Court's analysis. *See Opp'n* 7:20-8:4 (stating incoherently, within a single sentence, "*Irrespective* of what Capital one may have said *elsewhere* in the solicitation, . . . the 'Schumer Box' . . . expressly said that the APR was 'fixed,' in no uncertain terms,

which was entirely ***in***consistent with statements made elsewhere in the solicitation." (original emphasis)); also compare Opp'n fn. 5 (arguing that "statements made ***outside*** the 'Schumer Box' should not play a role in the analysis of whether there was a TILA violation for disclosures ***required inside*** the Schumer Box") (original emphasis) *with* Opp'n 8:14-16 (stating, "Due to this inconsistent language in the solicitation materials, [ ] a reasonable consumer could find the materials confusing and misleading," thus demonstrating that Plaintiff bases her TILA claim on the allegation that statements presented *outside* the Schumer Box were misleading).

In any event, as discussed in *Roberts*, the Court may consider all of the information in a creditor's disclosures in determining whether the creditor has complied with the requirements of TILA to present its disclosures clearly and conspicuously. "When Congress decided to require credit card issuers to disclose required terms in a clear and conspicuous manner, [it is not likely] that it intended for us to ignore other statements made by those issuers in their credit card solicitation materials." *Roberts*, 342 F.3d at 267. Furthermore, by requiring creditors to disclose certain information inside the Schumer Box, Congress's purpose was to help customers access and understand such information, not to shield credit card companies from liability for information placed outside the Schumer Box. Accordingly, while "TILA only applies the 'clear and conspicuous' standard to required disclosures, we conclude that the TILA permits us to

consider materials outside of the Schumer Box in determining whether the credit issuer disclosed the required information clearly and conspicuously." *Roberts*, 342 F.3d at 268. *See also Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006) (holding that where a lender provided a borrower with a correct disclosure but also provided the borrower with an incorrect form, the disclosure was unclear); *Ralls v. Bank of N.Y.*, 230 B.R. 508, 516 (Bankr. E.D. Pa.1999) (stating that where there was a contradiction between TILA disclosures and other information provided by the lender, the disclosures were unclear). Here, Plaintiff asserts that certain statements outside of the Schumer Box render the disclosure misleading for several reasons. None of these claims is legally sound.

First, Plaintiff contends that Defendant's listing, below the Schumer Box, of three specific events that could cause her rate to change was misleading because it "failed to specify 'rising interest rates' as a specific event that could lead to an interest rate increase." (Opp'n 13:17-21.) However, Defendant's listing of "specific events" complied with section 226.5a(b)(1) of Regulation Z, which requires the disclosure of "a *penalty rate* that will apply upon the occurrence of one or more *specific events*." 12 C.F.R. § 226.5a(b)(1) (emphasis added). The limited nature of this disclosure obligation is made clear by O.S.C. comment number 7 to section 226.5a(b)(1). This comment is entitled "Increased penalty rates" and requires that "[if] the initial rate may increase upon

the occurrence of one or more *specific events*, *such as a late payment or an extension of credit that exceeds the credit limit*, the card issuer must disclose in the table the initial rate and the increased penalty rate that may apply." O.S.C. § 226.5a(b)(1), cmt. 7, at p. 395 (emphasis added). Based upon this comment, it is clear that the "specific events" that could trigger "penalty rates" are customer defaults, "such as a late payment." Rising interest rates – something that no particular customer has control over – are not customer "defaults" for which a "penalty rate" may be imposed upon a customer. Accordingly, neither TILA nor Regulation Z required Defendant to disclose in the solicitation that the APR may rise because of rising interest rates, because a rising interest rate is not a "specific event" that could trigger a "penalty rate." Furthermore, as discussed in the Court's March 13 Order dismissing Plaintiff's breach of contract claim, nothing in the disclosure suggests that the list of three specific events constitutes a complete list of reasons why the APR may be increased.[1] As such, Defendant's disclosure of the three "specific events" complied with TILA's express disclosure obligation and was not otherwise misleading.

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[1] The Court agrees with Plaintiff that the March 13 Order dismissing the contract claim is not determinative of whether Plaintiff has stated a TILA claim. However, to the extent the March 13 Order includes analysis that is relevant to the present Motion, the Court finds it appropriate to note that analysis

In addition, Defendant's disclosure of the three specific events *below* the Schumer Box rather than within it complied with the Regulation Z. Comment 7 instructs that "[f]or issuers using a tabular format, the specific event or events must be placed outside the table and an asterisk or other means shall be used to direct the consumer to the additional information." O.S.C. § 226.5a(b)(1), cmt. 7, at p. 395. This is precisely what Defendant did. (Indeed, as discussed above, Defendant's listing of the specific events outside the Schumer Box distinguishes this case from *Roberts*, where the specific events were stated within the box.) For the foregoing reasons, Defendant's disclosure of the three specific events complied with TILA both in substance and in form.

Second, Plaintiff claims that two statements Defendant made outside of the Schumer Box conflict with its characterization (within the Schumer Box) of the rate as "fixed." Specifically, Plaintiff contends that the disclosure that three specific events could cause the APR to rise conflicted with her understanding that the rate was "fixed." Similarly, Plaintiff contends that Defendant's statement in the "TERMS OF OFFER" that "My agreement terms (for example, rates and fees) are subject to change" conflicted with the characterization of the rate as "fixed." *See*, *e.g.*, Opp'n 8:15 (stating "Due to this inconsistent language in the solicitation materials ('fixed' APR versus allegedly reserving the right to change the APR), a reasonable consumer could find the materials confusing and misleading.") However, as stated above,

"fixed" in the context of interest rates simply means that the rate in not pinned to an index or formula, not that the rate is permanent over time. Furthermore, unlike in *Roberts*, Defendant's solicitation contains no reference to the rate being "fixed" temporally. As such, there is no inconsistency between characterizing a rate as "fixed" and disclosing that it could rise due to specific events or subject to Defendant's express reservation to change the rates. In other words, an APR can be both "fixed" and subject to change.

Although Plaintiff does not expressly argue so, her claim *may* be read as asserting that disclosures concerning the possibility of the APR changing should have been disclosed inside the Schumer Box. However, Plaintiff has identified no section of TILA or Regulation Z that requires such a disclosure. However, an issuer cannot include in the Schumer Box any information not specifically required to be placed therein. *See* O.S.C. §. 226.5a(a)(2), cmt. 4., at p. 393 (stating, "The table containing the disclosures required by § 226.5a should contain only the information required or permitted by this section. [ ] Other credit information may be presented on or with an application or solicitation, provided such information appears outside the required table.") Because neither the "specific events" nor the statement that the terms of the agreement may change are required to be inside the Schumer Box, they *cannot* be stated inside the Schumer Box without running afoul of TILA. Thus, to the extent Plaintiff may be attempting to assert such a claim, it fails.

Furthermore, TILA plainly contemplates a creditor's making a blanket reservation to change the terms of the account at its discretion and for reasons not specifically set forth in he [sic] solicitation or customer agreement. *See e.g.*, O.S.C. § 226.9(c), cmt. 1, at 423 (stating that "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate)"; *see also id.* § 226.6(a)(2), cmt. 2, at 411 (stating "the creditor's contract reservation to increase the rate without reference to such an index or formula (for example, a plan that simply provides that the creditor reserves the right to raise its rates) would not be considered a variable-rate plan for Truth in Lending disclosure purposes.") As such, Defendant's statement in the "TERMS OF OFFER" informing Plaintiff that the terms of the agreement, including rates, are subject to change is consistent with TILA. Accordingly, the statements Defendant placed outside the Schumer Box both comply with TILA and could not be misleading to a reasonable consumer.

Finally, having compared the objected-to elements of the solicitation with the relevant portions of TILA, Regulation Z, and the O.S.C., it is apparent that Defendant complied with the disclosure requirements stated therein: Plaintiff has identified no required disclosure that was omitted, nor were the disclosures Plaintiff received misleading. Plaintiff

does not challenge the propriety of the Board's regulations, and it is not for the Court to substitute its "own interstitial lawmaking for that of the Federal Reserve." *Ford Motor Credit Co.*, 444 U.S. at 568. As the Supreme Court has stated, "[t]he concept of 'meaningful disclosure' that animates TILA, cannot be applied in the abstract. Meaningful disclosure does not mean more disclosure." *Id.* Thus, to permit this claim to proceed despite Defendant's compliance with TILA and Regulation Z would frustrate the purposes of the law.

Accordingly, Plaintiff has failed to state a claim for relief under TILA. As a matter of law, Defendant's use of the term "fixed" within the Schumer Box was consistent with TILA and was not misleading, either independently or when viewed in the context of the remainder of Defendant's solicitation. Nor do the objected-to elements of the solicitation outside the Schumer Box run afoul of TILA's mandate that the disclosures it requires be "clear and conspicuous" and not misleading. Plaintiff's TILA claim is therefore **DISMISSED**.

B. Plaintiff's UCL Claim

Plaintiff's second claim for relief asserts that Defendant's conduct also violated all three prongs of California's Unfair Competition Law, Business and Professions Code section 17200 *et seq.*, because it was unlawful, unfair and deceptive. However, in light of

the foregoing analysis, none of these claims can survive.

To state a claim for an "unlawful" business practice under the UCL, a plaintiff must assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (2000) (stating, "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other law and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation omitted). Where a plaintiff cannot state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001). Here, Plaintiff has predicated her "unlawful" business practices claim on her TILA claim. However, as discussed above, Plaintiff's attempt to state a claim under TILA has failed. Accordingly, Plaintiff has stated no "unlawful" UCL claim.

Relatedly, none of Plaintiff's UCL claims can survive because Defendant's practices fall within the UCL's "safe harbor." Defendant contends that all of the conduct about which Plaintiff complains complied with TILA and Regulation Z. "A court may not allow plaintiff to 'plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition.'" *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). *See also Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999) (stating, "a business practice cannot be unfair if it is permitted by law.") "A bar against an action

'may not be circumvented by recasting the action as one under [the UCL].'" *Cel-Tech*, 20 Cal. 4th at 182. However, "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct." *Smith*, 93 Cal. App. 4th at 720. "In other words, courts may not use the unfair competition law to condemn actions the Legislature permits. Conversely, the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair. Plaintiffs may not 'plead around a 'safe harbor,' but the safety must be more than the absence of danger." *Id.* at 184. In *Smith*, for example, the Court found that an insurer could not be held liable under the UCL for engaging in conduct mandated or permitted by the California Insurance Code. *See Smith*, 93 Cal. App. 4th at 717-721. The same conclusion obtains here because, as discussed above, "another provision" (TILA and Regulation Z) "clearly permit[ted]" Defendant's conduct. Indeed, Plaintiff's sole argument in opposition to this point is that the safe harbor is inapplicable because the conduct violates TILA. (*See* Opp'n 17:23-18:15.) Thus, the opposition concedes that if Plaintiff's TILA claim fails, then the UCL claim is barred by the safe harbor. For the foregoing reasons, Defendant is entitled to the benefit of the safe harbor and there is no room for any UCL claim based upon Defendant's conduct. Plaintiff's UCL claim is therefore **DISMISSED** in its entirety.

Having so ruled, the Court need not reach Defendant's alternative arguments. In light of the foregoing

analysis, it is apparent that Plaintiff will not be able to salvage any of her claims by further amending her complaint. Accordingly, her claims will be dismissed with prejudice.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**. Plaintiff's First Claim for Violations of the Truth In Lending Act and Second Claim for Violations of California Business and Professions Code section 17200 *et seq.*, are **DISMISSED with prejudice** for failure to state a claim.

Because this Order disposes of all of Plaintiff's claims, Plaintiff's Second Amended Complaint is hereby **DISMISSED**. Defendant is **ORDERED** to lodge a proposed Order for Entry of Judgment within five (5) days of the issuance of this Order.

SO ORDERED.

DATED: August 11, 2008

/s/ Audrey B. Collins

AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAQUEL RUBIO, on behalf of herself and all other similarly situated, Plaintiff-Appellant, v. CAPITAL ONE BANK, Defendant-Appellee.	No. 08-56544 D.C. No. 2:07-cv-06766-ABC-CW Central District of California, Los Angeles ORDER (Filed Sep. 29, 2010)

Before: B. FLETCHER, PREGERSON and GRABER, Circuit Judges.

A majority of the panel has voted to deny the petition for panel rehearing. Judge Pregerson voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommends. Judge Graber voted to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D

The Truth in Lending Act, 15 U.S.C. § 1601 et seq.

§ 1632. Form of disclosure; additional information

(a) Information clearly and conspicuously disclosed; "annual percentage rate" and "finance charge;" order of disclosures and use of different terminology

Information required by this subchapter shall be disclosed clearly and conspicuously, in accordance with regulations of the Board. The terms "annual percentage rate" and "finance charge" shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identi[t]y of the creditor. Except as provided in subsection (c) of this section, regulations of the Board need not require that disclosures pursuant to this subchapter be made in the order set forth in this subchapter and, except as otherwise provided, may permit the use of terminology different from that employed in this subchapter if it conveys substantially the same meaning.

(b) Optional information by creditor or lessor

Any creditor or lessor may supply additional information or explanation with any disclosures required under parts D and E of this subchapter and, except as provided in sections 1637a(b)(3) and 1638(b)(1) of this title, under this part.

(c) Tabular format required for certain disclosures under section 1637(c)

(1) In general

The information described in paragraphs (1)(A), (3)(B)(i)(I), (4)(A), and (4)(C)(i)(I) of section 1637(c) of this title shall be –

(A) disclosed in the form and manner which the Board shall prescribe by regulations; and

(B) placed in a conspicuous and prominent location on or with any written application, solicitation, or other document or paper with respect to which such disclosure is required.

(2) Tabular format

(A) Form of table to be prescribed

In the regulations prescribed under paragraph (1)(A) of this subsection, the Board shall require that the disclosure of such information shall, to the extent the Board determines to be practicable and appropriate, be in the form of a table which –

(i) contains clear and concise headings for each item of such information; and

(ii) provides a clear and concise form for stating each item of information required to be disclosed under each such heading.

(B) Board discretion in prescribing order and wording of table

In prescribing the form of the table under paragraph (A), the Board may –

(i) list the items required to be included in the table in a different order than the order in which such items are set forth in paragraph (1)(A) or (4)(A) of section 1637(c) of this title; and

(ii) subject to subparagraph (C), employ terminology which is different than the terminology which is employed in section 1637(c) of this title if such terminology conveys substantially the same meaning.

(C) Grace period

Either the heading or the statement under the heading which relates to the time period referred to in section 1637(c)(1)(A)(iii) of this title shall contain the term "grace period".

* * *

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§ 1637 Open end consumer credit plans

* * *

(c) Disclosure in credit and charge card applications and solicitations

(1) Direct mail applications and solicitations

(A) Information in tabular format

Any application to open a credit card account for any person under an open end consumer credit plan, or a solicitation to open such an account without requiring

an application, that is mailed to consumers shall disclose the following information, subject to subsection (e) of this section and section 1632(c) of this title:

(i) Annual percentage rates

(I) Each annual percentage rate applicable to extensions of credit under such credit plan.

(II) Where an extension of credit is subject to a variable rate, the fact that the rate is variable, the annual percentage rate in effect at the time of the mailing, and how the rate is determined.

(III) Where more than one rate applies, the range of balances to which each rate applies.

(B) Other information

In addition to the information required to be disclosed under subparagraph (A), each application or solicitation to which such subparagraph applies shall disclose clearly and conspicuously the following information, subject to subsections (e) and (f) of this section:

(i) Cash advance fee

Any fee imposed for an extension of credit in the form of cash.

(ii) Late fee

Any fee imposed for a late payment.

(iii) Over-the-limit fee

Any fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account.

* * *

The Federal Reserve Board Regulation Z, 12 C.F.R. § 226.5(a)(1) (footnote omitted):

The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep.

* * *

The Federal Reserve Board Official Staff Commentary on Section 226.5(a)(1) of Regulation Z

Clear and conspicuous. The *clear and conspicuous* standard requires that disclosures be in a reasonably understandable form. Except where otherwise provided, the standard does not require that disclosures be segregated from other material or located in any particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size. (But see comments 5a(a)(2)-1 and -2 for special rules concerning section 226.5a disclosures for credit card applications and solicitations.) The standard does not prohibit:

- Pluralizing required terminology ("finance charge" and "annual percentage rate").

- Adding to the required disclosures such items as contractual provisions, explanations of contract terms, state disclosures, and translations.

- Sending promotional material with the required disclosures.

- Using commonly accepted or readily understandable abbreviations (such as "mo." for "month" or "Tx." for "Texas") in making any required disclosures.

- Using codes or symbols such as "APR" (for annual percentage rate), "FC" (for finance charge), or "Cr" (for credit balance), so long as a legend or description of the code or symbol is provided on the disclosure statement.

CAPITAL ONE® IMPORTANT DISCLOSURES

ANNUAL PERCENTAGE RATE (APR) for purchases*	A fixed rate of **6.99%** (0.01918% daily periodic rate)
Other APRs	Balance transfer APR: same as for purchases Cash advance APR: A fixed rate of 19.9% (0.05452% daily periodic rate) Default APR: Your APR may be increased to a fixed rate of 12.9% (0.03534% daily periodic rate) or a fixed rate of 25.9% (0.07096% daily periodic rate). See explanation below.
Grace period for repayment of the balance for purchases	You will have a minimum of 25 days without a finance charge on new purchases if the total New Balance is paid in full each month by the following statement closing date.
Method of computing the balance for purchases	Average daily balance (including new purchases)
Membership Fee	None.
Minimum Finance Charge	For each billing period that your account is subject to finance charge, a minimum total **FINANCE CHARGE** of $0.50 will be imposed.
Miscellaneous Fees	Cash advance fee: 3% of amount of the cash advance, but not less than $5 Late payment fee: $29 if your balance at the time the late payment fee is assessed is less than $1,000. If your balance at that time is greater than or equal to $1,000, fees for late payments will be $35. Over-the-credit-limit fee: $29 Balance transfer fee: None. Returned check fee: $29

* All your Annual Percentage Rates (APRs) are subject to increase if any of the following conditions ("Conditions") occur: (i) you fail to make a payment to us when due; (ii) your account is overlimit; (iii) or your payment is returned for any reason. All APRs will change with the beginning of the billing period after the period in which the condition occurred. The first time any of the Conditions occur, your purchase and special transfer APRs (as applicable) may be increased to a rate of 12.9% **ANNUAL PERCENTAGE RATE** (0.03534% daily periodic rate). If any of the Conditions occur twice within any 6-month period, all of your APRs may be increased to a rate of 25.9% **ANNUAL PERCENTAGE RATE** (0.07096% daily periodic rate).

* You are being offered a Capital One Platinum MasterCard account. The lines of credit offered with the Platinum MasterCard account range from $500 to $20,000.

* Alimony, child support or separate maintenance income need not be revealed if you do not choose to have it considered as a basis for repaying this loan.

Your minimum payment will be 3% of your outstanding balance or $10, whichever is greater. If your balance is less than $10, your minimum payment will equal your balance amount.

The minimum gross annual income required for an account is $10,000.

TERMS OF OFFER

I hereby apply to Capital One **Bank** (Capital One) for a credit card account. Everything that I have stated in this application is correct to the best of my knowledge.

* **Arbitration.** I understand that the Customer Agreement contains an arbitration provision that may limit my legal rights, including my right to go to court, to have a jury trial and to participate in class actions.

* I understand that I must be 18 years or older as well as a U.S. citizen or permanent resident alien to qualify for this offer. This limitation is nonenforceable and is void in residents of the dependent areas of the U.S.

* I understand that this offer is based on an initial assessment that I meet Capital One's credit standards, and that I may be ineligible if I have responded to a previous offer for a credit card issued by Capital One within the last 45 days or if I have been approved for a previous Capital One offer. I understand my credit line will be determined after Capital One approves my application.

* I understand that you will retain my application whether or not it is approved.

* Capital One maintains the right not to open my account if: 1) the information provided as part of my application is incomplete, inaccurate or unverifiable, or I no longer meet Capital One's standards for creditworthiness; 2) my name and/or mailing address has been altered; or 3) Capital One receives my application after it has expired. For verification, Capital One may contact me to confirm application information within 21 days of the receipt of my application. Capital One's decision to contact me may be based on my creditworthiness.

* I authorize you to bill my approved Capital One credit card account for the amount(s) listed for balance transfer. I understand that I am applying for a transfer amount up to the total amount listed on my Balance Transfer Request. I understand that you will advise me if you are unable to process my payment request for any reason. In addition, Capital One will not be responsible for any charges billed to me for the account(s) requested for balance transfers and Capital One will process only those Balance Transfer Requests that can be transferred under my assigned credit line.

* The terms of this offer may not be applied to existing Capital One accounts.

* I authorize Capital One to check my credit and employment history and to answer questions about my credit experience with me.

* I will receive the Capital One Customer Agreement and am bound by its terms and future revisions thereof. My Agreement terms (for example, rates and fees) are subject to change.

* Payments will first be applied to finance charges and fees, next to the fixed payment amount on your special transfer or special Purchase segment (if applicable), then, on each segment of your account in order of lowest to highest APRs. Lastly, any remaining payment will be allocated to promotional balances for applicable.

* An applicant, if married, may apply for a separate account.

California Residents. Applicants, if married, after credit approval, use the credit card account up to its credit line. It may be liable for amounts extended under the plan to any joint applicant. As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.

Married Wisconsin Residents: No provision of any marital property agreement, unilateral statement, or court order applying to marital property will adversely affect a creditor's interests unless prior to the time credit is granted, the creditor is furnished with a copy of the agreement, statement or court order, or has actual knowledge of the provision.

New York and Vermont Residents: Capital One may obtain at any time your credit reports, for any legitimate purpose associated with the account or the application we receive for an account including but not limited to reviewing, modifying, renewing and collecting on your account. On your request, you will be informed if such a report was ordered. If so, you will be given the name and address of the consumer reporting agency furnishing the report. New York residents may contact the New York State Banking Department (1-800-518-8866) for a comparative list of credit card rates, fees and grace periods.

Ohio Residents: Ohio anti-discrimination laws require creditors to make credit equally available to all creditworthy customers and that credit reporting agencies maintain separate credit histories on individuals upon request. The Ohio Civil Rights Commission administers these laws.

(continued)

BEST AVAILABLE COPY

Fair Credit Reporting Act Notice

You were selected for this offer based upon the information in your credit report which we and Capital One Bank (USA), N.A. (for credit-worthiness). Grant of the offer, after you respond to it, is conditioned upon your satisfying the creditworthiness criteria used to select you for the offer and upon your satisfying any applicable criteria bearing on your creditworthiness, including your income, employment, and any other information provided on your application. You have the right to prohibit information contained in your credit report from being used in connection with any credit or insurance transaction that is not initiated by you. You may exercise this right by contacting the credit reporting agencies' notification systems at: Experian Target Marketing, P.O. Box 919, 701 Experian Parkway #2, Allen, TX 75013, 1-888-567-8688; Equifax Options, P.O. Box 740123, Atlanta, GA 30374-0123, 1-888-567-8688; Trans Union Corporation, Attn: Marketing Opt-Out, P.O. Box 97328, Jackson, MS 39238-7328, 1-800-680-7293.

Capital One is a federally registered service mark. All rights reserved. Capital One supports information privacy protection. To view our notice, go to www.capitalone.com.

YOUR BILLING RIGHTS.

Keep This Notice for Future Use.

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify us in case of errors or questions about your bill. If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at the address listed on your bill. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights. In your letter, give us the following information:

1. Your name and account number.
2. The dollar amount of the suspected error.
3. Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment, your letter must reach us three business days before the automatic payment is scheduled to occur.

Your rights and our responsibilities after we receive your written notice. We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question or report you as delinquent. We can continue to bill you for the amounts you question, including finance charges, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due. If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is. If we don't follow these rules, we can't collect the first $50 of the questioned amount, even if your bill was correct.

Special rule for credit card purchases. If you have a problem with the quality of property or services that you purchased with a credit card and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

(a) You must have made the purchase in your home state or, if not within your home state, within 100 miles of your current mailing address; and

(b) The purchase price must have been more than $50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

Important Information About Your Credit Card Account

Finance Charge.

1. Transactions which are not subject to a grace period are assessed finance charges (1) from the date of the transaction or (2) from the date the transaction is processed to your account or (3) from the first calendar day of the current billing period. Additionally, if you did not pay the "New Balance" from the previous billing period in full, finance charges continue to accrue on your unpaid balance until the unpaid balance is paid in full. This means that you may still owe finance charges, even if you pay the entire New Balance indicated on the front of your statement by the next statement closing date, but did not do so by the previous month. Unpaid finance charges are added to the applicable segment of your Account. Cash advances (the cash advance segment) and special transfers (if your account includes a special transfer segment) may not avoid finance charges.

2. **Cash Advance, Purchase/Other Charges and Special Transfer or Special Purchase Segments (If Your Account Includes a Special Transfer or Special Purchase Segment).** Finance charge is calculated by multiplying the daily balance of each segment of your account (e.g., cash advance, purchase, special transfer, and special purchase) by the corresponding daily periodic rate(s) that have been previously disclosed to you. At the end of each day during the billing period, we apply the daily periodic rate for each segment of your account to the daily balance of each segment. Then at the end of the billing period, we add up the results of these daily calculations to arrive at your periodic finance charge for each segment. We add up the results from each segment to arrive at the total periodic finance charge for your account. To get the daily balance for each segment of your account, we take the beginning balance for each segment and add any new transactions and any periodic finance charge calculated on the previous day's balance for that segment. We then subtract any payments or credits posted as of that day that are allocated to that segment. This gives us the separate daily balance for each segment of your account. However, if you paid the New Balance shown on your previous statement in full (or if your new balance was zero or a credit amount), new transactions which post to your purchase or special purchase segments are not added to the daily balances.

   To calculate your total finance charge, multiply your average daily balance by the daily periodic rate and by the number of days in the billing period. Due to rounding on a daily basis, there may be a slight variance between this calculation and the amount of finance charge.

3. **Determining Daily Periodic Rates.** Divide the corresponding Annual Percentage Rates by 365 and round to the nearest 1/100,000th of 1%, not to exceed the maximum allowed by applicable law. If the daily periodic rates and corresponding Annual Percentage Rates increase, the Finance Charge will increase and your minimum payment may be greater. Refer to the IMPORTANT DISCLOSURES for daily periodic rates and Annual Percentage Rates.

Other charges.

Copying Charge: $3.00 for a copy of a Periodic Statement and $2.00 for a copy of a transaction (fee imposed per copy).

Important Information About Procedures For Applying for Or Opening A New Account:

To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify and record information that identifies each person who opens an account. What this means for you: When you apply for or open an account, we will ask for your name, address, date of birth and other information that will allow us to identify you.

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No. 10-977

Supreme Court, U.S.
FILED
MAR 2 - 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CAPITAL ONE BANK (USA), N.A.,

Petitioner,

v.

RAQUEL RUBIO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Defendant-Petitioner, throughout its brief, ignores two fundamental aspects of the decision below, namely, (1) that the decision of the Ninth Circuit Court of Appeals reversed a district court's *grant of a Fed. R. Civ. P. 12(b)(6) motion to dismiss* Plaintiff-Respondent's Second Amended Complaint; and (2) that the issue below was whether the use of the word "fixed" in the credit card solicitation at issue was sufficiently clear at the time that it was made that a court could determine, as a matter of law, that it was not misleading. Thus, Defendant-Petitioner phrases the question presented completely backwards, as if Defendant-Petitioner was appealing a grant of summary judgment in Plaintiff-Respondent's favor. The true question presented, which is the same question answered by the Ninth Circuit below, is as follows:

Whether, at the motion to dismiss stage, a description of an interest rate as "fixed" in a credit card solicitation, when the issuer simultaneously reserves the right to change such rate at whim, is so "clear" and written in such a "reasonably understandable form" that, as a matter of law, it cannot be misleading.

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INTRODUCTION

In 2008, Plaintiff-Respondent Raquel Rubio filed a Second Amended Complaint ("Complaint") in the United States District Court, Central District of California, against Defendant-Petitioner Capital One Bank (USA), N.A. ("Capital One"), which included a claim for violation of the federal Truth in Lending Act ("TILA"). The basis of Ms. Rubio's claim under TILA was that Capital One's use of the term "fixed" in the "Schumer Box" disclosure section of a credit card solicitation that she received in 2004, which described the Annual Percentage Rate ("APR") for the credit card being offered to her, was not "clear and conspicuous" under TILA and Regulation Z, because Capital One simultaneously reserved the right to change the APR on Plaintiff-Respondent's credit card at any time and for any reason. In analyzing this claim, at the motion to dismiss stage, the district court found that the credit card solicitation's APR disclosure in this manner was so clear and conspicuous that it could not be misleading as a matter of law, and dismissed Ms. Rubio's Complaint.

On July 21, 2010, the Ninth Circuit Court of Appeals issued its opinion reversing the district court's grant of Petitioner's motion to dismiss. The court of appeals held that Respondent had stated a claim under TILA because a reasonable person could view the "fixed 6.99% APR" language in Petitioner's solicitation as misleading where Petitioner had actually reserved the right to change such APR at any time and for any reason. The Ninth Circuit's decision

that Petitioner cannot show, *as a matter of law*, that the particular disclosure it made in this instance was so "clear and conspicuous" that it could not be misleading, was consistent with decisions from other circuits analyzing similar TILA claims under Regulation Z. *Rubio v. Capital One Bank*, 613 F.3d 1195 (9th Cir. 2010).

Petitioner asked for a panel rehearing and a rehearing *en banc*. Petitioner presented essentially the same arguments for the panel rehearing and rehearing *en banc* as it does here, namely, (1) that there was supposedly a circuit conflict deepened by the Ninth Circuit panel's decision that needed to be addressed by *en banc* review, and (2) that the panel's decision erroneously retroactively applied a 2009 TILA amendment to Respondent's claim. The Ninth Circuit did not find those arguments persuasive, and Petitioner's requests for panel rehearing and rehearing *en banc* were denied on September 29, 2010. Respondent respectfully requests that this Court do the same, and deny the petition, as neither of the reasons articulated by Petitioner support further review by this Court.

First, Petitioner contends that review by this Court is warranted because, according to it, there is a "three-way conflict" concerning the appropriate analysis of the "clear and conspicuous" disclosure requirement contained in TILA. Petitioner, however, selectively picks and chooses the cases, and the language from those cases, on which it seeks to base such conflict. A detailed review of the case law reveals

that the supposed conflict is actually illusory and that the Ninth Circuit's decision below is fully consistent with the reasoning and holdings of the various other circuits that have addressed this issue.

The Ninth Circuit, consistent with prior case law that reviewed the Schumer Box[1] requirements, appropriately relied on the staff commentary interpreting the "clear and conspicuous" language of 15 U.S.C. § 1632(a) and 12 C.F.R. § 226.5(a)(1) in relation to Regulation Z, namely, that such disclosures must be made "in a reasonably understandable form and readily noticeable to the consumer." 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1; *Rubio*, 613 F.3d at 1200; *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 263 (3d Cir. 2003); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA] or Regulation [Z] should be dispositive.") Thus, the Ninth Circuit held, consistent with prior case law, that "Regulation Z prohibits a Schumer Box from making 'misleading' APR disclosures, where 'misleading' means a disclosure that a reasonable

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[1] TILA requires that all direct-mail credit card solicitations disclose, among other things, the APR applicable to credit extended by a credit card issuer such as Capital One. *See* 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a. The APR disclosure in a credit card solicitation must be made "in the form of a table." 15 U.S.C. § 1632(c)(2)(A), 12 C.F.R. § 226.5a. This table is commonly referred to as the "Schumer Box." *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 263, fn. 1 (3d Cir. 2003).

consumer will either not understand or not readily notice." *Rubio*, 613 F.3d at 1200.[2]

The specific truth in lending issue the Ninth Circuit analyzed in this case dealt with the adequacy of Petitioner's APR disclosure. As the Ninth Circuit succinctly states: "The Schumer Box and the paragraph linked to it by an asterisk described the APR as 'fixed' and listed only three events under which the APR could increase. We conclude that Capital One cannot show that, as a matter of law, this disclosure is clear and conspicuous," where "the creditor has reserved the right to change the APR for any reason." *Rubio*, 613 F.3d at 1200, 1202. The Ninth Circuit's holding is non-controversial. Regulation Z specifically provides that the APR disclosure in a credit card solicitation "shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c). Thus, the Ninth Circuit reversed the district court's grant of Petitioner's motion to dismiss on that issue.

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[2] Courts from every circuit have consistently held that the analysis of the adequacy of TILA disclosures is an objective test from the point of view of a reasonable consumer. *See, e.g.*, *Roberts*, 342 F.3d at 262, 266, 267; *Palmer v. Champion Mortg.*, 465 F.3d 24, 28 (1st Cir. 2006) (test is "whether the average consumer, looking at the Notice objectively, would find it confusing"); *Lifanda v. Elmhurst Dodge*, 237 F.3d 803, 806 (7th Cir. 2001) ("our task is to determine whether, taking the facts in the light most favorable to [plaintiff], the TILA disclosures were clear and conspicuous to an ordinary consumer"), *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 847 (8th Cir. 2009) (test is whether "the average borrower would be confused.")

The case law from other circuits cited by Petitioner analyzing TILA, and discussed in detail below, demonstrates that this approach to the "clear and conspicuous" analysis of Regulation Z is consistent with other circuits, and that an APR disclosure under Regulation Z that is inconsistent with the credit card issuer's contractual language can constitute a TILA violation. 12 C.F.R. § 226.5(c); *Rossman v. Fleet Bank (R.I.)*, 280 F.3d 384, 390 (3d Cir. 2002).

Second, Petitioner contends that review is warranted because the Ninth Circuit's decision purportedly improperly creates retroactive liability for its conduct. Petitioner contends that the conduct at issue here was not governed by Regulation Z at the time of the actions complained of but is now governed by a 2009 amendment to Regulation Z. That interpretation of the Ninth Circuit's decision, however, is contrary to both prior case law and the Ninth Circuit's explicit holding.

As far back as 2003, and prior to the issuance of the solicitation at issue here, the Third Circuit had already found in *Roberts*, 342 F.3d at 260, that the use of the word "fixed" to describe an APR that could be changed at will by the card issuer could be a violation of TILA and Regulation Z. In circumstances very similar to the instant case, the Third Circuit held that the district court's holding that a solicitation by Fleet Bank which promoted a "fixed 7.99% APR," where the card issuer reserved the right to change the rate for any reason, could not be, as a matter of law, misleading, was in error. *Roberts*, 342

F.3d at 260, 268-69. The Third Circuit reversed the district court's grant of summary judgment, holding that the claims of a fixed APR could "cause a reasonable consumer to be confused about the temporal quality of the offer." *Roberts*, 342 F.3d at 268. Thus, contrary to Petitioner's argument, there is nothing "retroactive" about the Ninth Circuit's interpretation of TILA and Regulation Z to the facts of this case, as the Third Circuit had already held TILA and Regulation Z to apply to factually similar circumstances as far back as 2003.

Further, the explicit holding of the Ninth Circuit, which thoroughly considered the very issue of retroactivity raised by Petitioner, explicitly held that "[o]ur decision does not make the Board's new regulation retroactive . . . TILA has *always* prohibited misleading APR disclosures. Our holding is simply a concrete application of that prohibition." *Rubio*, 613 F.3d at 1202. Petitioner's argument as to retroactivity is meritless and does not warrant this Court's review.

Petitioner's reliance on this Court's decision in *Chase Bank USA, N.A. v. McCoy*, 562 U.S. ___, 131 S. Ct. 871 (Jan. 24, 2011), to support its retroactivity argument is inapposite. The decision in *McCoy* was based on a specific and unique circumstance, namely, the filing of an *amicus* brief by the Federal Reserve Board ("Board") which *specifically held* that the underlying regulation at issue in *McCoy*, as written at the time of the incident, *did not prohibit* the conduct complained of by respondent in that case. *McCoy*, 562 U.S. ___. Here, where no such contrary

interpretation by the Board exists and, in fact, the Third Circuit's *Roberts* decision had already found that Regulation Z, as then written, applied to these facts as far back as 2003, *McCoy* is inapplicable.

Finally, having no other argument to stand on, Petitioner argues that review should be granted because Capital One, and potentially other credit card issuers who made similar disclosures in the past, could be held liable for substantial damages. That is simply not a reason for review. If such an analysis was a proper reason for review, *any* decision by a federal appeals court that subjected a defendant to significant liability due to wrongful conduct would warrant review. Further, as noted above, Petitioner and other issuers were on notice as far back as 2003 that the use of the word "fixed" in this context could be a violation of TILA and Regulation Z due to the Third Circuit's decision in *Roberts*. There is simply no excuse for Petitioner or other card issuers to now claim to be surprised by a consistent decision by the Ninth Circuit.

Because the decision of the court of appeals is correct and the supposed conflict amongst the circuits is illusory, this Court's review is not warranted.

STATEMENT

A. TILA Background and Statutory Purpose

TILA was enacted in 1968 as Title I (Consumer Credit Cost Disclosure) of the federal Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146 (1968), and has been amended several times. TILA's statutory purpose, specifically stated in its introduction, is as follows:

> to assure meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601(a) (2000); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (the "purpose of the TILA is to promote the 'informed use of credit' by consumers.")

Put another way, because "consumers were being inundated with credit card solicitations that failed to disclose basic cost information about the cards being promoted," Congress enacted TILA to ensure that consumers of credit services can engage in significant comparison shopping by comparing credit terms more readily and knowledgeably than they otherwise would be able to do. *Roberts*, 342 F.3d at 265.

B. The Specific TILA and Regulation Z Provisions at Issue in Respondent's TILA Claim

In 2004, the sections of TILA and its supporting Regulation Z which governed open ended consumer credit plans mandated that any credit information required to be disclosed by TILA "be disclosed clearly and conspicuously." 15 U.S.C. § 1632(a). TILA and Regulation Z mandated that card issuers, in a credit card solicitation, must disclose the APR that would govern the credit transactions being offered, that such disclosure must be made in "a prominent location" on the solicitation, and that it must be in a "tabular format." 15 U.S.C. §§ 1632(c), 1637(c), 1637(c)(1)(A)(i); 12 C.F.R. §§ 226.5a(a)(2), 226.5a(b)(1). The table described in section 226.5a of Regulation Z, which was required to contain the APR disclosure "clearly and conspicuously," is commonly referred to as a "Schumer Box." *See Roberts*, 342 F.3d at 263. Regulation Z also specifically provided that the APR disclosure in a credit card solicitation "shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c).

The Official Staff Commentary for Regulation Z, as articulated by the Federal Reserve Board, as it existed in 2004, elaborated on the nature of the "clear and conspicuous" standard for disclosures that TILA required in solicitations for credit card services, stating that the "clear and conspicuous standard requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer."

Truth In Lending Act, Official Staff Commentary, 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. Therefore, based on the statutory provisions, regulations, and Official Staff Commentary of TILA as they existed in 2004, the time of the conduct alleged in this matter, it is clear that the APR disclosure contained in a credit card solicitation was required to be made in a "Schumer Box," in a "clear and conspicuous" manner, in a form "reasonably understandable" to a potential credit card consumer, and in a form which "reflect[ed] the terms of the legal obligations between the parties." 15 U.S.C. §§ 1632(a), 1637(c); 12 C.F.R. §§ 226.5(a)(1), 226.5(c), 226.5a; 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1.

Based on these specific elements of TILA, Regulation Z, and the Board's commentary, the Ninth Circuit properly found that it was a violation of TILA for Capital One to disclose in a Schumer Box a "fixed" APR on the credit card it was offering Ms. Rubio, along with three specific conditions where such APR was subject to change, when, according to Capital One, it had actually reserved the right to change the APR for any reason or no reason at all. *See Rubio*, 613 F.3d at 1202.

C. Petitioner's Discussion of Contract Law in the Petition Is Irrelevant

Respondent's breach of contract claim was dismissed by the district court and such dismissal was affirmed by the Ninth Circuit. It is not at issue here.

Yet, in its petition, Capital One proclaims that the "substance of the credit card offers and agreements . . . are governed not by TILA, but primarily by state lending and contract law" (Petition at 4) and then discusses at length the "three distinct means by which credit card issuers may change the interest rate that they charge the credit card holder." (Petition at 4-7). All of the contract law that Petitioner cites to governs what credit card issuers may do to raise an APR *once the customer has entered into a contractual relationship with the issuer.* This is completely irrelevant to Respondent's TILA claim, which deals with disclosure requirements *prior to* entering into such contractual relationship.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT "CONFLICT" SET FORTH BY PETITIONER IS ILLUSORY

Petitioner claims that there is a "three-way conflict" in the circuit courts "regarding the meaning of the clear and conspicuous disclosure requirement" in TILA, which Petitioner claims is somehow "deepen[ed]" by the Ninth Circuit's decision. (Petition at 17). In support of this proposition, Petitioner discusses a number of decisions from the Seventh Circuit, in addition to decisions from other circuit courts, including the First, Second, Fifth, Tenth, and Eleventh Circuits, all of which analyze various types of alleged financial disclosure violations. A close review of the

case law from other circuits cited by Petitioner for the proposition that a "conflict" exists, however, demonstrates that the majority of these cases do not even discuss the appropriate statutory provisions, and of the few that do, they actually *support* the Ninth Circuit's reasoning below.

The specific analysis that was before the court of appeals involved the requirement contained in TILA which mandates that credit card issuers disclose the APR on a credit card being offered to a potential consumer, inside a credit card solicitation's "Schumer Box" section, in a "clear and conspicuous" manner, and, therefore, in a "reasonably understandable form." 15 U.S.C. § 1637(c); 15 U.S.C. § 1632(a); 12 C.F.R. § 226.5(a)(1); 12 C.F.R. § 226.5a; 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. This requirement was mandated by the versions of TILA, Regulation Z, and the Official Staff Commentary as they existed in 2004. In fact, Petitioner *itself* described this as the issue that was before the court of appeals below.[3] There are only two circuit courts that have addressed this specific issue, the Ninth Circuit and the Third Circuit. Both circuits have come to the identical conclusion, that the use of the word "fixed" in the

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[3] Petitioner states that the issue in this case involves the requirement "that a credit card issuer must 'clearly and conspicuously' disclose certain information in a credit card solicitation 'in accordance with regulations of the [Federal Reserve] Board. 15 U.S.C § 1632(a) The Board's Official Staff Commentary provides that a disclosure is 'clear' when it is in a 'reasonably understandable form.'" (*See* Petition at "Question Presented").

Schumer Box to describe an APR that can be changed at will by the card issuer is not "clear and conspicuous" as a matter of law and may, therefore, violate TILA and Regulation Z. *See Rubio*, 613 F.3d at 1200; *Roberts*, 342 F.3d at 269.

Thus, in order to manufacture a "conflict" between circuits, Petitioner had to go far beyond the specific regulation at issue and instead, search the circuits for any cases that reference "clear and conspicuous" regardless of context, and regardless of when they were decided. In conducting such a search, Petitioner was able to locate a handful of cases that appear, at first glance, to create a conflict. A detailed analysis of those cases, however, shows that the conflict manufactured by Petitioner is illusory.

A. The Seventh Circuit

Courts in the Seventh Circuit have stated that the "legal standard under the Truth in Lending Act is the objective 'reasonable person' approach." *Smith v. Check-N-Go of Illinois*, 200 F.3d 511, 514-15 (7th Cir. 1999). For this reason, in the Seventh Circuit, as in the other circuits, the "'sufficiency of TILA-mandated disclosures'" is to be viewed "'from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor.'" *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 806 (7th Cir. 2001) (*quoting Smith v. Cash Store Mgmt., Inc.*, 193 F.3d 325, 327-28 (7th Cir. 1999)). The Seventh Circuit specifically stated in the matter of

Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407 (7th Cir. 1980) (rev'd in other parts on other grounds, *Pridegon v. Gates Credit Union*, 683 F.2d 182, 193-94 (7th Cir. 1982)), that a TILA violation had occurred because "in the process of comparing terms, [if] a consumer finds some simple interest loan disclosures given only in estimated figures, confusion is bound to result." *Id.* at 417-18. Therefore, in the Seventh Circuit, just like in *Rubio*, a TILA disclosure that may create confusion in a potential consumer with respect to terms of the credit being offered has been found to be a violation of TILA. *Id.*

Petitioner, either ignoring or misinterpreting the cases cited above, contends that, in "stark contrast to the decision below, the Seventh Circuit has held for more than 30 years that TILA's requirement of 'clear and conspicuous' disclosure addresses only the *legibility* of the disclosure and not its understandability." (Petition at 17) (emphasis in original). The case law that Petitioner sets forth for this proposition, however, demonstrates that the "clear and conspicuous" analysis in the Seventh Circuit is actually *not* limited to issues of legibility at all. In fact, Petitioner attempts to simply disregard in a footnote reference a case that even Petitioner concedes specifically articulates that "understandability" is a part of the "clear and conspicuous" analysis in the Seventh Circuit.[4]

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[4] Petitioner concedes at page 19, footnote 6 of the petition that "[i]n *Lifanda v Elmhurst Dodge, Inc*., 237 F.3d 803 (7th Cir. 2001), the court of appeals treated 'clear' as relating to understandability."

Capital One first cites to the matter of *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d at 418, decided more than 30 years ago, where the Seventh Circuit held that the specific TILA disclosure in that case, which involved a finance charge, was not clear because it was not legible. One of the TILA claims in the *Smith* matter was brought by debtors who claimed that a finance charge was not properly disclosed because it was "obscured behind printed words and lines in the form as to be illegible." *Id.* at 415. In analyzing this specific claim, the *Smith* court unremarkably held that the finance charge disclosure in that case was a TILA violation because it was, "in [the court's] opinion, unreadable." *Id.* at 418. Nothing in the decision states that the "clear and conspicuous" disclosure requirement is *limited* to issues of legibility.

In a separate holding concerning the adequacy of finance charge disclosures however, a section of the decision Petitioner ignores, the *Smith* court further determined that the finance charges at issue violated TILA's disclosure requirements because they could be misleading to a potential consumer. *Id.* at 417-18. In *that* part of its opinion, the *Smith* court specifically found a TILA violation, stating that "an unsophisticated debtor might well have difficulty in comparing two forms, one using the required terminology and the other using the terminology found here." *Id.* at 417. Thus, the *Smith* court held that a TILA violation had occurred based on the notion that if "in the process of comparing terms, a consumer finds some simple interest loan disclosures given only in estimated

figures, confusion is bound to result." *Id.* at 418. In direct contrast to Petitioner's contentions, even the very first case it cites from the Seventh Circuit demonstrates that the "clear and conspicuous" standard for TILA disclosures in the Seventh Circuit is analyzed based on the understandability of the disclosure.

The next decision Petitioner discusses is *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996). The claims of plaintiffs in *Channell* were brought under the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e ("CLA") and its supporting regulation, known as Regulation M, 12 C.F.R. § 213.4(a)(1). The *Channell* court started its analysis by finding that the CLA "and Regulation M do not define 'clear and conspicuous.'" *Channell*, 89 F.3d at 382. In contrast, the Official Staff Commentary to TILA's Regulation Z, which is at issue here, specifically states that "a disclosure is 'clear' when it is in a 'reasonably understandable form.'" 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. Thus, the discussion and holding in *Channell* is simply inapplicable to any discussion of a circuit conflict related to the statutes and regulations at issue here.[5]

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[5] Petitioner also cites to *Jordan v. Toyota Motor Corp.*, 236 F.3d 866, 867 (7th Cir. 2001), which refused to overrule *Channell* on issues related to the Consumer Leasing Act. For the same reasons as *Channell*, the analysis in *Jordan* is equally inapplicable.

Petitioner next discusses *Smith v. Check-N-Go of Illinois*, 200 F.3d 511 (7th Cir. 1999), which involved claims by debtors who had taken out "payday loans" from a lender. The debtors claimed that the disclosures made by the lender violated a specific TILA provision that provides that "the finance charge and annual percentage rate be 'more conspicuous than any other disclosure, except the creditor's identity.'" *Id.* at 513. The analysis of the *Smith* court, therefore, involved the issue of the *conspicuousness* of the TILA disclosures under 12 C.F.R. § 226.17.[6] *See Smith*, 200 F.3d at 513. Again, unremarkably, where the Seventh Circuit found the disclosure to be insufficiently conspicuous, it never had to reach the question of whether or not such disclosure was understandable to a reasonable consumer.

Petitioner finally cites to *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 723 (7th Cir. 2004), which involved claims by a plaintiff under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, a completely different statutory scheme from TILA. The specific issue in *Cole* was whether statutorily mandated language was disclosed in a sufficiently conspicuous manner. *Cole*,

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[6] Petitioner repeatedly discusses several circuit court cases which involve *only* the "conspicuous" requirement to purportedly demonstrate a "conflict" with *Rubio*, despite also taking the position in its petition that Rubio failed to make a claim that the disclosures in her instance were not "conspicuous." *See* Petition at 13, fn. 5 (where Capital One contends that "Respondent did not argue that the *disclosure* was not conspicuous") (emphasis added).

389 F.3d at 729. Since the specific language at issue was statutorily mandated, again, unremarkably, the court in *Cole* never had to address, and, in fact, could not address, whether such language could be misleading. *Cole*, 389 F.3d at 731.

B. Petitioner Disregards the Seventh Circuit's Decision in *Lifanda v. Elmhurst Dodge, Inc.*

Petitioner's argument that Seventh Circuit case law somehow demonstrates a circuit "conflict" on the analysis of TILA's "clear and conspicuous" disclosure requirement cursorily refers to the matter of *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803 (7th Cir. 2001) in a footnote, and fully admits that the Seventh Circuit in *Lifanda* "treated 'clear' as relating to understandability." (Petition at 19, fn. 6) It then attempts to dismiss the *Lifanda* holding by claiming it has not been followed by any other Seventh Circuit case and that it purportedly fails to address the other Seventh Circuit holdings discussed by Petitioner.

First, the *Lifanda* decision was cited with approval by the *only* Seventh Circuit case cited by Petitioner that was decided *after Lifanda*, namely, *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 723 (7th Cir. 2004). Although the *Cole* court did not cite to *Lifanda* for the particular point of law at issue here, certainly in the ten years that have passed since *Lifanda* was decided, the Seventh Circuit has had opportunity to overrule it if it believed it was wrongly decided.

Petitioner points to no decision that has done so. Second, as discussed above, *Lifanda* did not need to distinguish any prior contrary authority in the Seventh Circuit, because there was none. The cases cited to by Petitioner are either inapplicable, or actually support the *Lifanda* analysis.

Obviously, the approach of the Seventh Circuit in *Lifanda*, only described briefly by Capital One in a footnote, blatantly contradicts the very foundation of Petitioner's circuit "conflict" argument – that the "clear and conspicuous" analysis in the Seventh Circuit deals "only" with legibility. (Petition at 19, fn. 6) This is simply not true, as evidenced by *Lifanda*, and the other decisions discussed above.

C. Cases from Other Circuit Courts Cited by Petitioner Similarly Do Not Show the Existence of a "Conflict" Between Circuits

Unlike Petitioner's completely erroneous argument with respect to the holding of the Seventh Circuit, Petitioner acknowledges that the First, Second, Fifth, Tenth, and Eleventh Circuits have analyzed TILA disclosure claims based on whether the disclosures are understandable, as did the Court in *Rubio*. (*See* Petition at 19) However, Petitioner then manufactures a new supposed distinction between the *Rubio* decision and opinions from those other circuits, claiming (without citation) that the Ninth Circuit in *Rubio* held that "*any* ambiguity

constitutes a violation of TILA," while "a majority of [other] courts hold that, so long as a disclosure is 'reasonably' or 'sufficiently' clear, that suffices to meet the clear and conspicuous requirement." (Petition at 19-20) This contention misstates the holding below.

What the Ninth Circuit *actually* said, citing to the Seventh Circuit's decision in *Lifanda*, 237 F.3d at 808, its own prior decision in *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989), and the Third Circuit's decision in *Rossman*, 280 F.3d at 394, is that, at the motion to dismiss stage, "any *misleading* ambiguity – any disclosure that a reasonable person could read to mean something that is not accurate – 'should be resolved in favor of the consumer.'" *Rubio*, 613 F.3d at 1202 (*quoting Rossman*, 280 F.3d at 394) (emphasis added). Thus, the Ninth Circuit's decision is fully in line with the decisions of every other circuit, namely, that a disclosure that a reasonable person could read to mean something that is not accurate, i.e., a confusing disclosure, or one which is so ambiguous that it would cause a reasonable person to be misled, cannot be held to be a clear and conspicuous disclosure as a matter of law. Neither the Ninth Circuit in this case, nor any other circuit, requires "perfect notice" as Petitioner contends. What the Ninth Circuit held, in line with every other circuit, is that where a notice is so ambiguous as to be misleading, it cannot be held to be clear and conspicuous as a matter of law.

In an attempt to manufacture this conflict, Petitioner has browsed through the TILA decisions from different circuit courts spanning almost 40

years, pulled out various statements describing TILA's "clear and conspicuous" language from the decisions of those courts, and pieced together statements that Petitioner contends represent conflicts with the Ninth Circuit. These vague distinctions between the language in different TILA decisions amounts to nothing more than minor nuances that *always* exist in the language of opinions from different courts, whether from the same or different circuits. If such nuances of language actually represented a circuit conflict, this Court would have a never-ending workload "resolving" such circuit conflicts.

1. First Circuit

Petitioner cites to two decisions from the First Circuit, both of which involve issues of notice of rescission rights involved in mortgage lending under 15 U.S.C. § 1635(a) and 12 C.F.R. § 226.23, and the "clear and conspicuous" disclosure analysis therein. (*See* Petition at 20) Petitioner attributes to the First Circuit a statement from *Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12, 16 (1st Cir. 2007), that "'[m]ost courts have concluded that TILA's clear and conspicuous standard is less demanding than a requirement of perfect notice.'" (Petition at 20) This analysis is not inconsistent with the decision in *Rubio*, which similarly does not require perfect

notice, but simply requires the notice to be clear enough so as to be not misleading.[7]

A close review of the other decision from the First Circuit cited by Petitioner, *Palmer v. Champion Mortgage*, 465 F.3d 24 (1st Cir. 2006), which also involved the adequacy of notice of rescission rights in mortgage lending under 15 U.S.C. § 1635(a) and 12 C.F.R. § 226.23 and made a similar holding as *Santos-Rodriguez*, perfectly demonstrates how the law on the adequacy of TILA disclosures in the First Circuit is entirely in line with *Rubio*, and with that of other circuits. Specifically, the *Palmer* court stated that TILA places an

> emphasis on objective reasonableness, rather than subjective understanding, [which] is also appropriate in light of the sound tenet that courts must evaluate the adequacy of TILA disclosures from the vantage point of a hypothetical average consumer – a consumer who is neither particularly sophisticated nor particularly dense. *See Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327-328 (7th Cir. 1999) (explaining that TILA disclosures should be viewed from the perspective of an

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[7] Other First Circuit decisions have emphasized that "even without an explicit statutory provision, courts have interpreted TILA to prohibit misleading statements, holding that 'a misleading disclosure is as much a violation of TILA as a failure to disclose at all'" *Barnes v Fleet National Bank, N A.*, 370 F.3d 164, 174 (1st Cir 2004), *quoting Smith v. Chapman*, 614 F 2d 968, 977 (5th Cir 1980)

> ordinary consumer, not a federal judge); *see also Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291, 296 (5th Cir. 1978) ("We must assess the adequacy of disclosure . . . by the audience for which disclosure was intended.") Thus, we turn to the question of *whether the average consumer, looking at the Notice objectively, would find it confusing*.

Palmer, 465 F.3d at 28 (emphasis added). Based on the above, the approach of the First Circuit to the "clear and conspicuous" disclosure analysis is entirely consistent with – and actually supports – the reasoning behind the decision in *Rubio*, namely, that a notice that a reasonable consumer would find confusing cannot, as a matter of law, be clear and conspicuous.

2. Eleventh Circuit

The Eleventh Circuit decision cited by Petitioner, *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 580 (11th Cir. 1996), like the cases from the First Circuit, also involved an analysis of whether notice of rescission rights in the mortgage lending context was adequate under TILA and Regulation Z, 12 C.F.R. § 226.1, *et seq*. Petitioner cites to language from that decision holding that a disclosure that was "reasonably clear when applied to the particular facts involved in this case" met the clear and conspicuous disclosure requirement because it "provides sufficient notice." (Petition at 20) This wholly unremarkable proposition, applied to the specific finding of that case, namely, that provision of an H-8 form notice was

sufficient disclosure of rescission rights as to the second-mortgage transaction, in the context of a second-mortgage only financing, where it failed to specify that there was no right to rescind the original mortgage.[8] *See Veale*, 85 F.3d at 580. There is nothing about that specific holding related to the facts of that case that conflicts with the Ninth Circuit's holding in the instant case.

3. Second and Sixth Circuits

Petitioner initially cites to language from *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 118 (2d Cir. 1983), where the Second Circuit stated that a "disclosure that 'requires the consumer to exercise some degree of care and study' to understand it suffices to meet TILA's clear and conspicuous requirement."[9]

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[8] As Capital One points out, a Third Circuit case cited in the petition, *Porter v Mid-Penn Consumer Discount Co*, 961 F.2d 1066, 1076 (3d Cir. 1992), held differently than the *Veale* court with respect to whether the specific form containing the notice of rescission rights in those cases adequately disclosed the borrower's rescission rights. (Petition at 20). However, these courts applied the same standard to the specific analysis of rescission rights under 12 C.F.R § 226.1 They simply arrived at different conclusions with regard to a close question

[9] The *Gambardella* case was decided in 1983 under truth in lending laws from the state of Connecticut, and referred to the versions of TILA and Regulation Z in existence prior to the 1980 TILA amendments. *See Gambardella*, 716 F2d at 106 As a result, the specific TILA requirement at issue in *Rubio*, that APR disclosures be made "clearly and conspicuously" in a credit card solicitation's "Schumer Box" was not yet in existence, as it

(Continued on following page)

(Petition at 21) Petitioner fails to cite to the immediately following language, however, which clarifies this statement: "TILA, however, does not require perfect disclosure, but only disclosure which clearly reveals to consumers the cost of credit. *See Dixon v. D.H. Holmes Co.*, 566 F.2d 571 (5th Cir. 1978). Because the statements G. Fox sent Connecticut consumers, read as a whole, clearly disclosed periodic and annual rates, the imperfections in format did not violate the law." *Gambardella*, 716 F.2d at 118. Again, there is nothing remarkable about the Second Circuit's language which would lead to a different result in *Rubio*.

Petitioner also cites to an additional Second Circuit decision, *Lundquist v. Security Pacific Automotive Financial Servs. Corp.*, 993 F.2d 11 (2d Cir.) (*per curiam*), *cert. denied*, 510 U.S. 959 (1993), for the proposition that "a disclosure will not meet the clear and conspicuous requirement when it is 'beyond the understanding of the average consumer.'" (Petition at 21) The full quote, in context, reads as follows:

> we agree with the district court that the Security Pacific lease disclosures are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer.

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was not implemented as part of TILA and Regulation Z *until 1988*. *Roberts*, 342 F.3d at 263

Lundquist, 993 F.2d at 15. Again, there is nothing remarkable about the Second Circuit's decision. It does not hold that disclosures can be misleading *only* if they are "beyond the understanding of the average consumer," only that the particular disclosure at issue was so. In fact, the Second Circuit affirms the same "reasonably understandable" standard applied by the Ninth Circuit in the instant case. *Lundquist*, 993 F.2d at 15.

Petitioner then cites to *Burton v. Public Fin. Corp. of Akron*, 657 F.2d 842 (6th Cir. 1981), a *per curiam* decision, as holding that a "disclosure not clear [sic] when it 'borders on the incomprehensible.'"[10] (Petition at 21) Again, Petitioner takes this quote out of context. In finding that a particular disclosure violates TILA, the Sixth Circuit held "[t]his clause is not 'clear,' it borders on the incomprehensible. Complex accounting terms and confusing syntax are used to obscure the meaning of this clause, not to explain its terms." *Burton*, 657 F.2d at 843. Thus, it is not the holding of the Sixth Circuit that a statement *has to be* incomprehensible in order to violate TILA, just that the statement in that particular case *was* incomprehensible.

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[10] Like *Gambardella*, this decision was rendered prior to revisions of TILA and Regulation Z which added the "clear and conspicuous" APR disclosure standard in 1988

4. Fifth and Tenth Circuits

Petitioner contends that the Fifth Circuit case of *Dixon v. D.H. Holmes Co.*, 566 F.2d 571 (5th Cir. 1978) (*per curiam*), again decided before the 1988 revision to TILA and Regulation Z at issue here was in effect, is "in tension" with the *Rubio* holding because, according to Petitioner, the case shows that Fifth Circuit courts have held that "clarity can be achieved even if there are clearer ways of conveying the information." (Petition at 21) The specific statement that Capital One cites from the *Dixon* opinion is that the "'question is not whether something is capable of semantic improvement, but whether it contains a substantial and accurate disclosure.'" (Petition at 21) There is nothing inconsistent about this holding and the holding of the Ninth Circuit. In fact, it tracks the Ninth Circuit language which held that a disclosure is misleading where "a reasonable person could read [it] to mean something that is not accurate." *Rubio*, 613 F.3d at 1202.

Petitioner finally cites to the Tenth Circuit decision in *Scofield v. Telecable of Overland Park*, 973 F.2d 874 (10th Cir. 1992) and references statements from that decision which it also contends are "in tension" with *Rubio*. (Petition at 21) Again, however, the statements cited are simply different ways of stating the same standard. For example, Petitioner states that in the Tenth Circuit, the "question is what 'the average subscriber will likely understand.'" (Petition at 22). The language is essentially the same as that used in every other circuit, with the Tenth

Circuit using the word "likely" in place of "reasonably."

Based on the above, there simply is no "conflict" among the circuit courts that needs resolution with respect to the truth in lending issues raised in this matter. Further, Petitioner even admits that these decisions of the First, Second, Fifth, Tenth and Eleventh circuits "appear to be consistent with the Federal Reserve Board's Official Staff Commentary." (Petition at 22). Similarly, as Petitioner reluctantly concedes in a footnote, it is also clear that the Seventh Circuit, as evidenced by its decision in *Lifanda*, is consistent with the other circuits and Official Staff Commentary.

Given this admission, Petitioner's contention, then, that the Ninth Circuit's decision below represents a circuit conflict is even more puzzling, as the Ninth Circuit specifically cites to that very same Staff Commentary as the basis for its decision. *See Rubio*, 613 F.3d at 1200 (holding that "[t]his disclosure must be clear and conspicuous, . . . which, for purposes of credit card solicitations, *is defined in the official staff commentary to Regulation Z* as 'in a reasonably understandable form and readily noticeable to the consumer.'" (*citing* 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1; *Barrer v. Chase Bank USA, N.A.*, 566 F.3d 883, 887 & n.4 (9th Cir. 2009) (noting that the official staff commentary is owed deference)) (emphasis added).

5. Third Circuit

Petitioner's hair-splitting becomes clear, however, when it attempts to distinguish the Third Circuit decisions from the remaining circuits, namely, it contends that the Ninth Circuit in this case, and the Third Circuit in other cases, have invented a new standard under TILA requiring "perfect disclosure in order for [the disclosure] to be clear and conspicuous." (Petition at 23). That, however, is simply not the case. In support of its theory, it cites to *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066, 1076 (3d Cir. 1992) for the proposition that the Third Circuit requires perfect disclosure. It completely ignores, however, the very language of the case it cites, which explicitly holds that "the law *does not require an ideal notice* of rescission rights, just a clear, accurate, and conspicuous one. To determine whether the notice that Porter did receive was *confusing or misleading*, we have no choice but to embark on a close reading of that notice." *Id.* (emphasis added). Similarly, it cites to *Rossman v. Fleet Bank (R.I.) N.A.*, 280 F.3d 384 (3d Cir. 2002), but ignores the factual discussion prior to the quote:

> For we believe a reasonable consumer would, at any rate, be entitled to assume upon reading Fleet's solicitation that the issuer was committed to refraining from imposing an annual fee for at least one year. The statement "no annual fee," in other words, is fairly understood to contain an implied term of a year. If Fleet had imposed an "annual fee" of

> twenty dollars upon the opening of Rossman's account, she would have been entitled to expect that, upon payment of that fee, she would be entitled to a year's use of the card, assuming her other obligations were met. Thus, had Fleet imposed another "annual fee" of thirty-five dollars mid-year, she would surely have been deceived. The original twenty-dollar fee would then not be an *annual* fee, but simply a fee. Similarly, a reasonable consumer could understand the statement "no annual fee" as describing a promise of (at least) a fee-free year. It would follow that Rossman's credit card was not a no-annual-fee card unless no such fee would be charged for a year. Consequently, Fleet's statement to the contrary would be false or misleading for purposes of the TILA.

Rossman, 280 F.3d at 394.

The primary problem with Petitioner's argument that language differences of this type in opinions from various circuits are "conflicts" and create a circuit conflict in need of resolution by this Court is that interpretation of TILA and Regulation Z is, necessarily, a fact specific and somewhat nuanced inquiry. Thus, each court, writing each opinion, may phrase the exact query in a slightly different manner, sometimes referring to it as "likely," sometimes "reasonably," sometimes "plausibly," sometimes "clearly." These terms are all, however, effectively interchangeable. Each circuit that has looked at this issue since the issuance of the Official Staff Commentary on

Regulation Z has followed the Staff Commentary. There is no circuit conflict in need of resolution by this Court, and Petitioner's argument that the decision by the Ninth Circuit below is in "conflict" with the decisions of other circuits is simply wrong.

II. *RUBIO* DOES NOT CREATE ANY "RETROACTIVE LIABILITY"

Petitioner contends that the Ninth Circuit's decision below somehow subjects it to "retroactive liability" for the contents of the credit card solicitation it sent to Rubio in 2004, and that the decision therefore warrants review by this Court. (*See*, *e.g.*, Petition at 2). The basis for this contention appears to be Capital One's erroneous suggestion that the *Rubio* court used the Board's 2009 amendment to Regulation Z to determine "what the pre-2009 Regulation Z required." (Petition at 24). That is simply not the case.

First, Petitioner completely ignores the 2003 decision from the Third Circuit in *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260 (3d Cir. 2003). In *Roberts*, decided prior to any of the actions complained of here, and under similar factual circumstances, the Third Circuit held that a card issuer's advertising of a "fixed" APR could constitute a violation of TILA and Regulation Z where the card-issuer reserved the right to raise the APR at will. *Roberts*, 342 F.3d at 260. More specifically, in *Roberts*, Fleet Bank sent an offer to plaintiff Roberts promoting a "fixed 7.99% APR." *Roberts*, 342 F.3d at 268. Just like Capital One did to

Respondent, subsequent to plaintiff Roberts opening a credit card account with Fleet Bank based on the offer and its advertisement of a "fixed" APR, Fleet Bank sent a letter stating that it was increasing the "fixed" APR to 10.5%. *Roberts*, 342 F.3d at 268.

Plaintiff Roberts asserted causes of action against Fleet Bank, including a violation of TILA, for advertising a "fixed" APR in its offer, and then subsequently increasing the APR on the credit card. The Third Circuit analyzed plaintiff Roberts' TILA claims and the solicitation Fleet Bank sent to her, and held that there was a triable issue of fact, at the summary judgment stage, as to whether the materials Fleet Bank sent to Roberts were misleading and therefore a violation of TILA's "clear and conspicuous" disclosure requirement. *Roberts*, 342 F.3d at 260. Specifically, the Third Circuit in *Roberts* stated that:

> Because the purpose of the TILA is to assure meaningful disclosures, "the issuer must not only disclose the required terms, it must do so accurately." *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n,* 280 F.3d 384, 390-91 (3d Cir. 2002). "The accuracy demanded excludes not only literal falsities, but also misleading statements." *Id.* (citing *Gennuso v. Commercial Bank & Trust Co.,* 566 F.2d 437, 443 (3d Cir. 1977)).

Roberts, 342 F.3d at 266. Thus, the *Roberts* court found that it could be misleading and in violation of TILA for a credit card issuer to advertise a "fixed" APR with only two possible avenues for increase

listed in the Schumer Box when, in fact, according to the issuing bank, the APR was actually subject to change for any reason whatsoever. *Roberts*, 342 F.3d at 266.

Thus, as far back as 2003, and prior to the specific solicitation at issue here, Petitioner, and other card issuers, were on notice that the use of the word "fixed" to describe an APR that was subject to change at will could be held to violate TILA and Regulation Z. The Ninth Circuit in this case essentially echoed the findings of the Third Circuit in 2003. Thus, for Petitioner to argue that the only way the Ninth Circuit could have interpreted TILA and Regulation Z to apply in this instance is by a retroactive application of a 2009 amendment to Regulation Z is pure fantasy.

Respondent brought her claims against Petitioner based on specific provisions in TILA and Regulation Z that governed Petitioner's conduct at the time of those claims, and well within the statute of limitations for such claims. In fact, at the time that Ms. Rubio brought her initial complaint in October 2007, even drafts of the 2009 amendments to Regulation Z were not promulgated. Thus, both at the time of the solicitation at issue, and at the time the original complaint was filed, Plaintiff was proceeding on the basis of a violation of Regulation Z as then articulated.

As the Ninth Circuit held, "although clarity and conspicuousness is a question of law, empirical evidence is helpful in determining what a reasonable consumer will understand and readily notice." *Rubio*,

613 F.3d at 1200 (citations omitted). Thus, the Ninth Circuit reasonably looked to research done by the Federal Reserve Board related to how a reasonable consumer would interpret the language "fixed rate." *Id.* The Ninth Circuit reasoned "where such persuasive and directly relevant evidence is available, armchair empiricism is comparatively unhelpful in determining how a reasonable consumer will read a solicitation." *Id.*

After reviewing the findings of the Board, the Ninth Circuit found that, as alleged in the Complaint, the term fixed "can *reasonably* be interpreted to mean 'unchangeable'" by a consumer. *Rubio*, 613 F.3d at 1202. Thus, it held, "it is not 'clear and conspicuous' to describe an APR as 'fixed' when the creditor has reserved the right to change the APR for any reason." *Id.*

Further, the Ninth Circuit did not simply avoid discussing the issue presented here by Petitioner. It thoroughly understood that it might be accused, as it is by Petitioner, of retroactive application of the 2009 amendment and it discussed the issue in detail. Specifically, it held that:

> The new regulation did not become effective until after the events giving rise to this litigation, and thus does not bind us. *The form of Regulation Z that governs this case, however, does prohibit disclosures that a reasonable consumer will not understand.* 12 C.F.R. pt. 226 supp. I, para. 5a(a)(2), cmt. 1. The new regulation was adopted because the agency that implements TILA, relying on

> empirical evidence, concluded that describing an APR as "fixed" is misleading to reasonable consumers. What was misleading in 2006 and 2007, when the consumer studies were conducted, was also misleading in 2004, when Rubio received Capital One's solicitation.
>
> * * *
>
> Our decision does not make the Board's new regulation retroactive. The Board promulgated its new regulation because, after surveying consumers, it concluded "fixed" was misleading. That is why the new regulation is relevant and helpful: TILA has *always* prohibited misleading APR disclosures. Our holding is simply a concrete application of that prohibition.

Rubio, 613 F.3d at 1201-02 (emphasis added).

Not only did the *Rubio* court make clear that it had not relied on the recent amendment to TILA's regulations in holding that use of the word "fixed" in this context violated TILA Regulation Z, but it also had no need to. The Third Circuit had already found, *six years* before any such amendments were introduced by the Board, that the use of the word "fixed" to describe an APR that was changeable at will was a violation of TILA and Regulation Z as then implemented. *See Roberts*, 342 F.3d at 260.

Petitioner also repeatedly refers to the recent decision of this Court in *Chase Bank USA, N.A. v. McCoy*, 562 U.S. at ___, for the proposition that the *Rubio*

court made the "same error" that was identified in *McCoy*, which Capital One contends is "mistakenly relying on the Board's current regulation in determining 'what the pre-2009 version of Regulation Z required.'" (Petition at 24) For the reasons discussed above, this is factually wrong. Further, even if it were not factually wrong, the *McCoy* decision is inapposite. The decision in *McCoy* was not a general prohibition against the use of future agency statements or actions to interpret agency regulations. Rather, it was based on a very specific, and unique, circumstance. This Court in *McCoy* had the benefit of, and relied upon, an *amicus* filing by the Federal Reserve Board which *specifically found* that the underlying regulation at issue in *McCoy*, as written at the time of the incidents in *McCoy*, *did not prohibit* the conduct complained of by respondent in that case at that time. *McCoy*, 562 U.S. at ___. Here, no such contrary interpretation by the Board exists, and, in fact, the Third Circuit's *Roberts* decision had already found that Regulation Z, as then written, applied to these facts. *McCoy* is inapplicable.

III. THE NINTH CIRCUIT'S DECISION IS NON-CONTROVERSIAL

Petitioner cites to various articles, including such sources as the websites for the law firms of Foley & Lardner LLP and Styskal, Wiese & Melchonie LLP, for the proposition that the Ninth Circuit's decision herein will result in broad negative consequences. That is simply not the case. As discussed in detail

above, the Ninth Circuit's decision tracks the Third Circuit's 2003 decision in *Roberts*. Card issuers such as Petitioner should have been on notice as far back as 2003 that if they used the word "fixed" to describe an APR, when, in reality, they reserved the right to change that APR for any reason at any time, they may be subject to liability. Thus, contrary to Petitioner's contention, no "*ex post facto*" disclosure obligations are being imposed on lenders through the Ninth Circuit's decision, and no broad negative consequences flow from the decision.

CONCLUSION

For all of these reasons, the Court should deny Capital One's Petition, as there are insufficient grounds to warrant the review requested.

Respectfully submitted,

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CAPITAL ONE BANK (USA), N.A., PETITIONER,

v.

RAQUEL RUBIO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF FOR PETITIONER

A divided panel of the Ninth Circuit reached a result under the Truth in Lending Act (TILA) applying a legal standard contrary to that used by other courts of appeals interpreting the same statutory language. The Ninth Circuit held that a disclosure cannot be "clear" if a reasonable person could read the disclosure in more than one way. That very legal rule had previously been considered, yet not adopted, by the Federal Reserve Board when it addressed possible amendments to its definition of the term "clear."

Here, the Ninth Circuit subjected petitioner to TILA liability for a disclosure regarding "fixed" interest rates made in 2004. It did so even though the Federal Reserve Board expressly elected to regulate disclosures about "fixed" interest rates only *prospectively* (i.e., after February 22, 2010). In many ways, this case resembles *Chase Bank USA N.A. v. McCoy*, 562 U.S. ___, 131 S. Ct. 871 (2011), another TILA case in which the Ninth Circuit mistakenly read new regulations retroactively and threatened massive liability against the lending industry. Respondent attempts to distinguish *McCoy* based on the existence of an amicus brief by the Board that informed the Court that the prior regulation did not prohibit the conduct. Br. in Opp. 6, 36. But here too the Board has made clear that its pre-2010 regulations did not prohibit the disclosure made here. Indeed, it characterized its new, 2010 regulations as a "major change." Final Rule, 74 Fed. Reg. 5244, 5245 (Jan. 29, 2009).

This Court's review is thus warranted and the petition should be granted. At a minimum, if there is any doubt as to the meaning of the Board's regulation or the significance of the ruling below, this Court should invite the views of the Solicitor General of the United States.

A. Contrary To Respondent's Claim, The Courts Of Appeals Are Divided On A Recurring Issue Of Exceptional Importance

Respondent seeks to avoid review by obscuring the Ninth Circuit's holding. Respondent contends that the Ninth Circuit merely held that she stated a claim under TILA that the disclosure was not "clear and conspicuous," and that it did not hold that she had established a violation. Br. in Opp. i, 2. But the panel held that whether a disclosure was "clear" was a matter of law, not of fact, Pet. App. 9a, and then went on to hold that petitioner "cannot show that, as a matter of law, this disclosure is clear." Pet. App. 9a. In doing so, the panel majority expressly rejected the dissenting judge's view that the case should be remanded for a jury trial on the question whether the disclosure was "clear." Pet. App. 13a; Pet. App. 23a (Graber, J., dissenting).

Respondent also tries to avoid the conflict among the circuits regarding TILA's disclosure requirement by characterizing the holding in this case as confined to disclosures regarding the so-called "Schumer Box." Br. in Opp. 4, 9-10, 12-13. But the panel reversed because it held that petitioner did not comply with

TILA's requirement to "clearly" disclose certain information. Pet. App. 9a, 16a. That requirement appears over 30 times in TILA. The holding in this case is thus not limited to any particular disclosure requirement of TILA, but will apply to every disclosure mandated by TILA. As shown in the petition, the courts of appeals have adopted different standards for determining whether a disclosure is "clear."[1]

1. Respondent does not defend what the Ninth Circuit actually held in this case. The Ninth Circuit first reasoned that, in order to be "clearly" disclosed, a disclosure must be "reasonably understandable," wording drawn from the Federal Reserve Board's Official Staff Commentary. Pet. App. 8a (quoting 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 5a(a)(2).1). But in applying that standard, the Ninth Circuit held that a disclosure cannot be "reasonably understandable" if "reasonable consumers can interpret [it] * * * in more than one way." Pet. App. 13a.

Respondent attempts to diminish that holding by suggesting that the Ninth Circuit merely held that a disclosure that is "so ambiguous that it *would* cause a reasonable person to be misled" is not "reasonably

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[1] Respondent notes that all of the circuits have held that the inquiry is an objective one, and not based on the subjective understanding of any particular consumer. Br. in Opp. 4 n 2, 13, 22-23 That consensus does not address the question, which divides the circuits, about how to measure whether a disclosure is "clear" to that hypothetical consumer.

understandable." Br. in Opp. 20 (emphasis added); *see id.* at 23. But respondent's characterization cannot be squared with the critical language of the Ninth Circuit's decision. The panel held that so long as a reasonable person "*could* read [a disclosure] to mean something that is not accurate," then it was not reasonably understandable. Pet. App. 13a (emphasis added). That application of the Federal Reserve Board's "reasonably understandable" definition also has been accepted by the Third Circuit. Pet. 23-24. Yet that is an unnatural reading of the regulatory definition.

Indeed, the Board has declined to embrace that legal standard. In 2003, the Board proposed to amend the definition of "clear" in TILA's Official Staff Commentary to give examples of disclosures that were reasonably understandable. *See* Truth in Lending, 68 Fed. Reg. 68,793 (proposed Dec. 10, 2003). In response, consumer representatives complained that "the Board's proposed interpretation of 'clear' [was] not sufficient" because it did "not set high enough standards." 69 Fed. Reg. 35,541, 35,542 (June 25, 2004). In particular, consumer representatives asked the Board to provide in its Commentary that "a disclosure is not clear if it is 'capable of more than one plausible interpretation.'" *Ibid.* The Board declined to do so. Instead, consistent with other commenters' suggestions, the Board withdrew the proposed rulemaking and announced it intended "to focus on individual disclosures and to consider ways

to make specific improvements to the effectiveness of each disclosure." *Id.* at 35,543.

2. As the petition shows (Pet. 19-22), a number of circuits have accepted the Board's "reasonably understandable form" definition of "clear," but have applied a more lenient standard than the Ninth Circuit.

Respondent first attempts to limit each case to its facts. Br. in Opp. 21-28. But it is evident that those decisions find a disclosure to be "clear" even though a reasonable consumer could "interpret it in more than one way." Such a disclosure would not be clear under the holdings of the Third and Ninth Circuits. Pet. App. 13a; Pet. 23-24.

For example, respondent claims that in *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 581 (11th Cir. 1996), cert. denied, 520 U.S. 1198 (1997), the Eleventh Circuit "simply arrived at different conclusions" than the Third Circuit had in *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066 (1992), even though they "applied the same standard" to the same disclosure. Br. in Opp. 24 n.8. But the standard was the critical difference in those cases. In both *Veale* and *Porter*, the lender issued a notice to the borrowers that provided: "You have a legal right under federal law to cancel this transaction. . . . If you cancel the transaction, the (mortgage/lien/security interest) is also canceled." 85 F.3d at 580 (emphasis omitted); *see* 961 F.2d at 1076-1077. But, in fact, the borrowers "did not have the right to rescind the entire security

interest." 85 F.3d at 580. That was because the borrowers "already owed [the lender] money and [the lender] already had a mortgage on their home. Thus, [the lender] would still hold a mortgage on the home even if the [borrowers] elected to rescind the current transaction." *Ibid.* The Third Circuit in *Porter* held that the notice was subject to two "sensible" readings and "[b]ecause both readings are plausible, we conclude that the [notice] did not provide [the borrower] with a clear notice of what her right to rescind entailed." 961 F.2d at 1077. The Eleventh Circuit "respectfully disagree[d]" with the Third Circuit and held that the same notice was "reasonably clear" and "provide[d] sufficient notice" for purposes of TILA. 85 F.3d at 581.

Respondent also asserts that the decisions cited in the petition from the Second and Sixth Circuits are not relevant to whether there is a circuit conflict because they were decided before TILA was amended in 1980 and before the Schumer Box requirements were enacted in 1988. Br. in Opp. 24-25 n.9, 26 n.10. But the "clear and conspicuous" requirement has been in TILA since 1968. *See* Pub. L. No. 90-321, § 121, 82 Stat. 146, 152 (1968). The Federal Reserve Board's "reasonably understandable" interpretation was published in the Official Staff Commentary in 1981. Pet. 22. Thus, all the decisions cited in the petition deal with precisely the same statutory language and administrative guidance that the Ninth Circuit misinterpreted here.

3. Finally, respondent contends that the Seventh Circuit has not rejected understandability as a component of "clear and conspicuous." Except for the one outlier decision noted in the petition (Pet. 19 n.6), respondent is mistaken.

a. Contrary to respondent's claim (Br. in Opp. 14-16), *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407 (7th Cir. 1980), did not hold that a disclosure is not "clear and conspicuous" if it "may create confusion." The plaintiffs in *Smith* had three separate TILA claims. Only one claim related to the "clarity of the disclosures made." *Id.* at 415. The plaintiffs asserted that the amount of finance charge "while disclosed, is so obscured behind printed words and lines in the form as to be illegible." *Ibid.* The court of appeals held that the disclosure was "unreadable" and thus violated the creditors' obligation that "disclosures be made 'clearly.'" *Id.* at 418 & n.29. The court of appeals found a violation without any mention of the separate requirement that the disclosure be made conspicuously. Thus, the court of appeals in *Smith* equated clarity with legibility.

The language from *Smith* quoted by respondent addressed the plaintiffs' other TILA claims. The plaintiffs also had claimed that the creditor violated a TILA requirement that disclosures be made "in the terminology prescribed" by TILA, and that the creditor not describe numbers as "estimated" in most circumstances. On those claims, the Seventh Circuit explained that standardized terminology was intended to prevent confusion and promote comparison

shopping, and found that the creditor violated those other provisions by using terminology different from that allowed by the regulations. *Id.* at 416-418. Respondent in this case pressed no such TILA claims, claiming only that petitioner's disclosure was not "clear."

b. Respondent cannot and does not dispute that the Seventh Circuit held in *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (1996), that the term "clear and conspicuous" "refers to the mode of presentation, not the degree of comprehension." *Id.* at 382. Instead, respondent asserts that that decision can be ignored because it was interpreting the Consumer Leasing Act (CLA). But the CLA was enacted by Congress in 1976 as an amendment to TILA, *see* Pub. L. No. 94-240, § 3, 90 Stat. 257, 257 (1976), and uses the same language.

Respondent also asserts that there was no regulation under the CLA providing a definition similar to that contained in the Board's Official Staff Commentary to its TILA regulations. But in fact, the Board has adopted the same definition for the CLA. The Board in its Official Staff Commentary to its CLA regulations defines the term "clear and conspicuous" to mean that the disclosure be "reasonably understandable." 12 C.F.R. Pt. 213, Supp. I, Official Staff Interpretations, cmts. 3(a)-2 and 7(b)-1. This has been the Board's interpretation of "clear and conspicuous" in the CLA since at least 1982. *See* 47 Fed. Reg. 20,553, 20,557 (Official Staff Interpretation May 13, 1982).

c. Respondent also errs in asserting that the Seventh Circuit's discussion in *Smith v. Check-N-Go of Illinois, Inc.*, 200 F.3d 511 (1999), addressed only conspicuousness, and not "clear." Br. in Opp. 17 & n.6. In that case, the Seventh Circuit addressed a claim that one term was not "more conspicuous" than another, as required by TILA. In so doing, the Seventh Circuit explicated the relationship between "clear" and "conspicuous," while reaffirming that neither goes to understandability of content. Judge Easterbrook (who previously had authored *Channell*) explained that "whether particular disclosures are 'clear' is an issue of fact, for the extent to which one piece of paper obscures another varies, and clarity depends on what a particular borrower would observe." *Smith*, 200 F.3d at 514. Whether one disclosure is more conspicuous than another, by contrast, is a legal matter because it "depends on the contents of the form," and not on what the borrower saw. *Id.* at 515. This expressly conflicts with the Ninth Circuit's view that clarity is a question of law, Pet. App. 9a, which focuses on the contents of the form.

d. As noted in the petition, there is a subsequent Seventh Circuit decision that treats the word "clear" as requiring some level of understandability. Pet. 19 n.6 (citing *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803 (7th Cir. 2001)). But, as respondent acknowledges (Br. in Opp. 18), the Seventh Circuit has never cited *Lifanda* for that particular point of law. And that case did not grapple with the Circuit's earlier decisions, which gave the term

"clear" a meaning that did not require courts to decide what reasonable consumers would find understandable.

B. The Ninth Circuit's Decision Expressly Relied On The New Federal Reserve Board Regulations And Effectively Made Them Retroactive, Despite The Contrary Determination Of The Board

Respondent does not dispute that the Federal Reserve Board promulgated a new regulation, effective February 22, 2010, that expressly deals with when it is appropriate to use the word "fixed" in describing an interest rate. Pet. 24. Nor does she contest that that regulation does not govern this case, in which the disclosure was made in 2004. That is because the Board expressly elected not to make the regulation retroactive, and instead gave credit card companies months after the regulation's promulgation to bring their disclosures into compliance with the new rule, which the Board found was a "major change," 74 Fed. Reg. at 5245. *See* Pet. 24-25.

Offering a block quote from the decision below, respondent asserts that the Ninth Circuit made "clear that it had not relied on the recent amendment to TILA's regulations." Br. in Opp. 35. But respondent uses ellipses to omit crucial sentences from the Ninth Circuit's opinion. Br. in Opp. 34-35. Contrary to respondent's claim, the panel majority *expressly* relied on the 2009 amendments in reaching its conclusions about how to read the "clear" requirement.

> *The new regulation* and the empirical studies it relies on *are therefore relevant and informative for this case.* For even where not binding, *an agency's interpretation of a statute certainly may influence courts* facing questions the agency has already answered.

Pet. App. 12a (emphases added; quotation marks and brackets omitted). The panel thus found the new regulation "relevant" and "influen[tial]," yet disregarded the Board's determination to give it only prospective effect. That is precisely the type of error this Court found that the Ninth Circuit made in *McCoy*, mistakenly relying on the Board's current regulation in determining "what the pre-2009 version of Regulation Z required." *McCoy*, 131 S. Ct. at 881.

Respondent also asserts (Br. in Opp. 5-6, 7, 31-33, 35, 36, 37) that such retroactive application does not harm petitioner because it should have been on notice, from the Third Circuit's decision in *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260 (2003), that the use of the word "fixed" in a Schumer Box violated TILA. But in *Roberts*, the word "fixed" was not in the Schumer Box, it was in a separate introductory letter. The court of appeals expressly cautioned that the lack of clarity "is not that Roberts could have concluded that the rate was permanent solely based on the use of the word 'fixed.' Rather, the concern is that [the lender] may have misled potential consumers by indicating that the rate could only change in the instances it specified in the solicitation materials." *Id.* at 268 n.3. Here, the solicitation materials

expressly provided that petitioner could change the interest rate. Pet. App. 66a. Thus *Roberts* provided no notice of the liability created by the Ninth Circuit here.

C. The Ninth Circuit's Decision Is Wrong And Will Result In Broad Negative Consequences

The panel majority held that petitioner had violated TILA because using the word "fixed" to describe the interest rate did not make it "clear" that the consumer was not entitled to that interest rate for the rest of her life. Pet. App. 12a. That holding cannot withstand scrutiny. Nothing in the solicitation entitled respondent to a credit card for life, much less the same interest rate for life. Indeed, on the very same page, the solicitation stated that the "Agreement terms (for example, rates and fees) are subject to change." Pet. App. 66a. And after respondent received a fixed interest rate for over three years, petitioner offered her a choice to either accept a new rate or to stop incurring new debt and pay off her old debt at the previous rate. Pet. 11-12, 32-33. No one could reasonably understand the solicitation to have entitled her to anything more.

Unless reviewed and reversed, however, the Ninth Circuit's decision will have enormous adverse effect on the lending industry. As the Federal Reserve Board found (and respondent does not dispute), the use of the word "fixed" in credit card solicitations was common before the Board prospectively imposed limits on the use of the word. Pet. 30-31. Respondent

herself acknowledges that these violations could result in "significant liability" and "substantial damages." Br. in Opp. 7. Indeed this lawsuit and others, involving more than a hundred thousand consumers, are currently pending. Pet. 33.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted. At a minimum, this Court should invite the views of the Solicitor General as to whether review should be granted.

Respectfully submitted,

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